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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ELECTRI-FLEX COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THOMAS D. BURLAGE
SAMUEL W. WITWER, JR.
R. DENNIS CLAESSENS
Attorneys for Petitioners

Of Counsel:

WITWER, MORAN, BURLAGE & ATKINSON
125 South Wacker Dr.
Chicago, Illinois 60606

CHAS. P. YOUNG-CHICAGO

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Petitioner respectfully prays that a Writ of Certiorari issue to review the Decision and Order of the United States Court of Appeals for the Seventh Circuit in its Cause No. 77-1515, decided February 14, 1978.

OPINIONS BELOW

The Decision and Order of the Court of Appeals in this cause is set forth in the Appendix to this petition, commencing at page A-67, *infra*. The decision has been officially reported at 570 F.2d 1327 (1978).

The Decision and Order of the National Labor Relations Board is set forth in the Appendix to this petition, commencing at page A-56, *infra*, and is reported at 228 NLRB No. 79 (1977).

The Decision and Order of the Administrative Law Judge of the National Labor Relations Board is set forth in the Appendix to this petition, commencing at page A-1, *infra*.

JURISDICTION

The Decision and Order of the Court of Appeals for the Seventh Circuit sought to be reviewed is dated February 14, 1978; that Court's Judgment is dated June 6, 1978. Petitioners filed a timely motion for a Stay of Mandate pending application for a Writ of Certiorari which was granted by the Court of Appeals by order dated June 19, 1978, as set forth in the Appendix at page A-93, *infra*.

Jurisdiction is conferred upon this Court to review the Decision and Order here in question by Writ of Certiorari as provided in Title 28 United States Code Par. 1254(1).

QUESTIONS PRESENTED

1. Whether an employer which, in the course of collective baragaining, implements contract proposals that were fully negotiated with the Union and upon which tentative agreement was reached at the bargaining table, makes unlawful changes in working conditions by failing to await final union membership ratification, when such implementation is essentially beneficial to employees and occurs without objection by the Union.

2. Whether the employer's increased and more consistent use of progressive disciplinary methods which had been utilized prior to the advent of the Union resulting in a marked overall decrease in the severity of disciplinary action constitutes an unlawful unilateral change in working conditions.

3. Whether Petitioner's pre-existing disciplinary system and all disciplinary action taken thereunder subsequent to the representation election can be invalidated in blanket fashion as discriminatorily motivated when evi-

dence of only a small percentage of said disciplinary action was placed in the record and when the Administrative Law Judge found that at least some of such disciplinary action was not motivated by animus.

4. Whether there is substantial evidence to support the Board's findings that Petitioner's layoff of one employee and the discharge or suspension of other individual employees was motivated by the employees' union and concerted activities.

STATUTES INVOLVED

The National Labor Relations Act, Section 7, Title 29 United States Code Par. 157, provides as follows:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) [Title 29 United States Code Par. 158(a)(3)]."

The National Labor Relations Act, Section 8(a), Title 29 United States Code Par. 158(a), provides in relevant part as follows:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> • • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

The National Labor Relations Act, Section 9(a), Title 29 United States Code Par. 159(a), provides in relevant part as follows:

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *"

STATEMENT OF THE CASE

I. INTRODUCTION

While this Court has considered the impact upon the collective bargaining process when an employer in the midst of negotiations unilaterally implements proposals still under discussion with a union, *NLRB* v. *Katz,* 369 U.S. 736 (1962), no case has presented the instant factual situation where the employer's implementing action followed tentative *agreement* at the bargaining table but preceded membership ratification. Collective bargaining law to date has provided no definitive guide to this novel question and we submit the opinion of the Seventh Circuit Court of Appeals herein, that the Employer by its actions undermined the collective bargaining process, is ill-founded.

In the course of collective bargaining with a newly certified union, the Petitioner-Employer adopted a practice of implementing contract proposals, piecemeal, as successive agreements were reached at the bargaining table. All implementing actions taken by the Employer were harmonious with the Union's stated bargaining position on the particular issues involved. In fact, the Employer followed the letter of the various clauses which had been reduced to written agreement at the bargaining table.

Although the Union negotiator on a few occasions had mentioned the familiar concept that bargaining table agreements are tentative and do not become "final" until a ratification vote by the membership, no objection was ever voiced during the bargaining process to the current implemention of such tentatively agreed provisions; nor did the Union ever demand postponement of implementation until after ratification.

The record indicates that the Employer was not selective about the proposed contract language which would receive immediate implementation, but rather, followed a uniform course of adapting its policies and practices to the evolving clauses of the agreement being fleshed out with the Union.

Most of the implementing action was favorable in its effect on employees, such as the granting of job posting (promotion) privileges, grievance privileges, seniority in layoffs (where no protective seniority rules had previously existed at the plant), use of warning notices and progressive discipline (in place of a previous heavy reliance on the discharge penalty) and a relaxed call-in rule for notifying the Employer of impending absences from work.

In the course of the NLRB proceedings below covering a variety of unfair labor practice charges, three specific implementing actions of the employer (the warning ticket program, the seniority on layoff and the call-in rule) were assailed on the principal theory that the Employer acted prematurely and unilaterally in violation of Section 8(a)(5) of the Act.[1]

While faulting the Emloyer for improper "unilateral" change with regard to the warning ticket disciplinary system, the Administrative Law Judge failed to find any bargaining violation in the Employer's application of the tentatively agreed seniority rules to a layoff which occurred in January, 1976, or in its implementation of a relaxed call-in rule. The Board subsequently modified his decision so as to find all three actions to be violative of the duty to bargain in good faith.

While the Seventh Circuit Court of Appeals in effect conceded that the Employer's piecemeal implementation approach might have passed Section 8(a)(5) muster by analogy to *NLRB* v. *Katz, supra,* and *NLRB* v. *Bradley Washfountain Co.,* 192 F.2d 144 (7th Cir. 1951), had the bargaining atmosphere been different, it upheld the Board's order on the basis of its belief that the Union's negotiator had foreclosed such an interim approach by his references to final membership ratification during the bargaining meetings. The Court said at A-80:

> "We express no opinion as to what the result might have been *had the parties been silent* as to the time and method of implemention for the tentative provisions, and the employees had been notified prior to the implementation of the changes, but that is not the situation here.
>
> The Union's representative, Mr. Haderly, testified that prior to and at all times during negotiations, the position of the Union which had been stated to the company, was that no agreement reached during negotiations was *effective* until ratified by the employees." (emphasis added)

The lynch-pin of the Seventh Circuit's decision on the bargaining issue, therefore, was its assumption that there was a Union veto or "stipulation" preventing changes from becoming "effective" pending ratification. This distinction cannot be sustained on the record. As we will show, the testimony is quite clear that the Union's negotiator *was* silent concerning the time and manner of implementation or "effectiveness" and only addressed the general principle, true of all collective bargaining negotiations, that achievement of a final agreement is always subject to the ratification vote of the membership.

Finally, aside from the tentative agreement issues surrounding the use of warning tickets, the Seventh Circuit erred in its treatment of the Employer's increased reliance on warning tickets (offset by a substantial reduction in discharges from a previous rate of about 35 per year to a post-union rate of about 5 per year) as a "change" requiring mandatory bargaining. In upholding the Board, the Court found the Employer had adopted a "new system of discipline" (Opinion at A-73). However, the opinion does not show an adequate basis for concluding that the

[1] Other aspects of the Employer's implementation program, such as promotions, posting and grievance privileges were never challenged, apparently because they had a uniformly salutory effect on all employees in the eyes of the Union and Board. Further, no contention is raised in this proceeding and on this record that the Company failed, in the totality of its conduct, to bargain in good faith. Finally, separate Section 8(a)(3) discrimination findings were made by the Board and upheld by the Seventh Circuit with regard to two of the three assailed employer actions (excepting the call-in rule). These findings are also discussed *infra.*

company's more consistent, frequent or uniform use of *previously employed* disciplinary methods constituted a fundamental "change" in mode of discipline which would offend Section 8(a)(5). Verbal warnings, tickets, suspensions and numerous discharges were employed prior to the Union for every conceivable type of infraction and safety violation. It was error for the Court to find that by its continued use of these methods which antedated the Union and by de-emphasizing discharges while emphasizing progressive use of warning tickets, the Employer made a qualitative "change" of the type which must, in the first instance, be bargained out with a union.

By these dual errors of (a) branding the increased warning ticket use as a "change," and (b) giving no effect to the Union's agreement on warning ticket use, the Court has mistakenly ordered the nullification of an entire disciplinary system as well as an unjustified "rebargaining" of terms and conditions which had already been vigorously negotiated and given the mutual approval of the parties. This "extra turn at bat" for the Union is unwarranted and cannot promote the policies of the Act.

II. PERTINENT FACTS

A. *Company Background, Representation Election.*

Electri-Flex Company is a manufacturer of flexible, electrical conduit located in Roselle, Illinois. At all times relevant to this proceeding, it employed between 70 and 100 employees. Prior to the RC petition filed by the Union on June 26, 1975, the Company had no experience with this or any other union.

The representation election was held August 7, 1975. The Union won by a margin of 44 to 11 and was formally certified as the collective bargaining representative of the employees at Electri-Flex's plant on August 15, 1975.

B. *Electri-Flex's Disciplinary Policies*

1. *Prior Disciplinary Methods.* During all times relevant to this proceeding the Company had rules and regulations in effect concerning call-in procedures for absence or tardiness, the wearing of safety shoes, glasses and gloves, hair length, general misconduct and various work rules. These rules antedated any union activity at the plant, had been posted intermittently and were handed or explained to most employees at time of hire.

In 1972 the Company had established a disciplinary system which included the issuance of written warning notices to employees. From 1972 until July, 1975, written warning notices were issued to employees on an infrequent basis. The primary instrument of discipline was discharge, an action frequently taken by the Company for a wide variety of offenses. Such actions were recorded on termination slips and retained in employee file jackets. In lieu of written warning notices, some supervisors used verbal warnings, suspensions, and decreases in pay as additional and progressive disciplinary measures. The result was a relative lack of consistency among departments in disciplinary action taken for similar violations of Company rules and a tendency to deal with infractions by utilizing the ultimate penalty of discharge even in the case of some first offenders.

Subsequent to the filing of the RC petition by the Union, (approximately one month before the election), the Company's attorneys recommended that the disciplinary system be administered more consistently by all supervisors and that all second disciplinary warnings be put in written form to insure that disciplinary action would be documented and orderly. This advice was reemphasized by counsel the evening of the election in a meeting at the plant. Thereafter, discipline at Electri-Flex was marked by a greater reliance on warning notices and progressive disciplinary action and a corresponding substantial reduction of employee discharges. Consequently, the record shows that

while there were 35 disciplinary discharges in the year preceding the election, there were only 4 such discharges during the 9 month period following the election.

2. *The Union Twice Agrees with the Improved Disciplinary System.* On September 18, 1975 at a meeting in the plant requested by Union officials concerned about disciplinary actions taken against Shop Chairman Ignacio Marrero, Company Vice President Bruce Kinander advised Frank Haderly, Business Agent and Chief Negotiator for the Union, that the Company was using written warning notices primarily as a corrective measure, but not as a method of discrimination or harassment. Haderly then approved the use of the warning notices.

The negotiations between the parties included frequent references to progressive discipline, primarily in the context of the absentee reporting policy of the Company's contract proposal. The written minutes of negotiations reflect that the Union approved, if not insisted upon, progressive disciplinary concepts. Working papers of the negotiations, tendered as an exhibit by the Employer but excluded by the Administrative Law Judge, show that the Union endorsed the use of warning tickets as a method of discipline early in the course of negotiations. This language was given summary approval of both parties at the negotiation meeting of October 24, 1975.

C. *Layoff of January, 1976.*

By the time of the ninth negotiation session on December 11, 1975, a complete Seniority/Layoff article had been approved by the Employer and Union. In January, 1976 the Employer determined that due to economic reasons it would be necessary to layoff approximately 30 employees.[2]

[2] The bona fides of the Company's decision to have a layoff was at no time challenged in these proceedings.

After consultation with the Company's attorneys, management decided to apply the seniority provisions of the tentative contract recently negotiated by the parties, which provisions included a "last date of hire" ranking system. Prior to this time the employees had no seniority rights, and during previous slow periods, the Company had exercised sole authority in laying off employees and had done so solely on the basis of Company needs rather than an employee's seniority. The Seventh Circuit so reorganized in its opinion saying, at A-*87:*

> ". . . the record clearly shows a [prior] pattern of total discretion on the part of the Company as to these decisions."

At the request of the Company, a meeting was held with representatives of the International Union and the Federal Mediator, Samuel Mazza, at the offices of the Federal Mediation & Conciliation Service on January 20, 1976 to advise the Union of the forthcoming layoff. At the meeting, the Union was advised of the reason for the layoff, assured that it would be conducted in accordance with the contract procedures which had been tentatively agreed to between the parties and given a copy of the seniority/layoff list prepared by the Company in accordance with the tentative seniority provisions. The Union did not object to the application of the tentative contract provisions on seniority dating, which provisions had their origin in a *Union* contract proposal including "last date of hire" handed out at the first bargaining meeting and subsesuquently incorporated into the working papers of the negotiators.[3]

[3] On this point, the Company sought to subpoena the Federal Mediator as a trial witness to corroborate its version of the discussion surrounding the layoff. It was unsuccessful in this effort due to a privilege invoked by counsel for the Federal Mediation and Conciliation Service.

On approximately January 22, 1976 a meeting was held at the plant to further discuss the forthcoming layoff. At the meeting the Union persuaded the Company, by way of "error" correction, to change the seniority date of Ignacio Marrero, the chief union steward, from April 8, 1975 to October 29, 1974. This change was prompted by the assertion of the Union and Marrero that Marrero had worked for Electri-Flex previously. A superficial check of Marrero's file followed, and it was determined that his date of hire was October 29, 1974. The Company, mistakenly assuming that Marrero had fulfilled the 60 day probationary period contained in the tentative contract provisions during his first employment with the Company, agreed to change Marrero's seniority date to October 29, 1974. Because of the "error" concerning Marrero's seniority date, it was agreed that the Company would conduct a thorough review of all the files and then present the Union with a revised seniority/layoff list. There was no dispute at this meeting in regard to the guidelines which were being used to determine who would be laid off.

On January 28, 1976 the Company presented a revised seniority/layoff list to the Union, but alerted the Union that the process of applying the contract provisions to all employees was not yet complete and further revisions might follow.

Subsequently, during the continuing review of the employee jackets, it was discovered that Marrero had remained with the Company only 37 days following his first date of hire on October 29, 1974 and, therefore, his correct "last date of hire" under the tentative contract provisions was April 8, 1975 as shown in the first seniority list prepared by the Company.

At a meeting between the Company and the Union on February 5, 1976, the Union was advised of the changes in the seniority date for Marrero and several other employees in accordance with the contract provisions. Upon being informed that Chief Steward Marrero's name had

been returned to the layoff list, the Union, for the first time, objected to the use of the tentative seniority provisions to determine who would be laid off. Following this meeting, Marrero was placed on layoff, and another employee with more seniority was recalled.

D. *The Absentee Call-In Rule.*

For some time prior to the Union election, the Company had given priority to a relatively strict call-in rule requiring employees to notify the Company of impending absence within two hours after the start of the affected individual's work shift. The reasons for such rule, explained by Kinander during the negotiations, pertained to unique features of the Company's production process and its vulnerability to "down-time" as a result of a mere handful of unreported absences.

Both the English and Spanish versions of the pre-union work rules of the Company opened with this rule and gave prominent attention to the matter, including a warning of possible discharge for failure to call-in. Prior to the Union, numerous employees lost their jobs for failure to abide by such rule.

The relative severity of the Company's pre-union call-in policy was a major issue of union concern in the negotiations, the Union insisting that the rule be applied with adequate warnings and progressive discipline. In response to the Union's urgings, the Company made several concessions relaxing such policy, including an increase in allowable call-in time from 2 to 4 hours and a 3 step disciplinary progression for each successive offense ranging from a warning to a suspension to discharge. At a negotiation meeting on December 11, 1975, the Union confirmed its approval of such liberalized call-in policy. Thereafter, up to and including the present date, the Company has applied this negotiated procedure. The Union never objected to the implementation of the more liberal call-in rule. The issue as to whether such implementation was an unfair labor practice

first was raised belatedly by General Counsel in its brief to the Board in opposition to Petitioner's appeal of the ALJ's decision. The Board and Court decided that this too was an instance of unauthorized unilateral action despite the express Union agreement and failure to object.

E. *The Alleged Discrimination against Individual Employees.*

The Board found that the Company violated Sections 8(a)(3) and (1) of the Act by its layoff of Marrero as previously discussed and by its transfer of Ibarra and Velez and discharge of Capasso and Martin. The Court of Appeals upheld the findings of the Board. This Petitioner submits that there is not substantial evidence of record to support the findings of the Board, and upon the issuance of a writ of certiorari to the Court of Appeals, these issues will be fully addressed in Petitioner's brief.

ARGUMENT

I. AN EMPLOYER'S ACTION IN IMPLEMENTING MEASURES HARMONIOUS WITH TENTATIVE BARGAINING TABLE AGREEMENTS DOES NOT CONSTITUTE BAD FAITH BARGAINING.

The instant case brings into focus a question which was implicitly involved in a line of decisions of this Court and in an earlier decision of the Seventh Circuit but which has never been squarely addressed. Does an employer's institution of job changes, in keeping with substantive terms and conditions *agreed upon* at the bargaining table undermine the collective bargaining process? In its decision here in question, the Seventh Circuit answered in the affirmative. We submit that such decision is contrary to the teachings of all the analogous decisions to which we have alluded. *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949); *NLRB* v. *Katz, supra* and *NLRB* v. *Bradley Washfountain Co., supra.*

The three cited cases did not confront the question of tentative bargaining table agreements but did involve unilateral actions by employers during negotiations and prior to impasse. They are briefly summarized as follows. In *Cromption-Highland Mills, supra,* an employer, following unproductive negotiations over wages, put into effect a wage increase which was substantially larger than any employer proposal previously discussed at the bargaining table. Noting the tendency of such action to "cut off the opportunity for bargaining" (337 U.S. at 224), this Court upheld the Board's finding that the employer had not consulted adequately with the Union or bargained collectively in good faith as the Act requires. The Court went on to note, however, at 337 U.S. 224:

> "We do not here have a unilateral grant of an increase in pay made by an employer *after the same proposal has been made by the employer in the course of*

> *collective bargaining* but has been left unaccepted or even rejected in those negotiations. Such a grant might well carry no disparagement of the collective bargaining proceedings. Instead of being regarded as an unfair labor practice, it might be welcomed by the bargaining representative, without prejudice to the rest of the negotiations." (emphasis added, citations omitted)

In *Katz, supra,* the issue was whether an employer's unilateral grant of wage increases and changes in its sick-leave program while such issues were still actively *under discussion* in negotiations (but not tentatively agreed to) would violate Section 8(a)(5). In holding that such actions were tantamount to an outright refusal to negotiate over those particular issues, this Court observed that such actions would have an obvious tendency to foreclose or limit further collective bargaining over the issues in question. This Court said at 369 U.S. 747:

> ". . . the Board *is* authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement. Unilateral action by an employer without prior discussion with the Union does amount to a refusal to negotiate about the effective conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the Congressional policy." (Court's emphasis in italics)

The Seventh Circuit's decision in *Washfountain, supra,* carries the analysis a step farther since the employer's implementing actions, while in the midst of negotiations, were consistent with its own collective bargaining proposals and at least in part, met the demands of the Union then pending on the bargaining table. Although no impasse had yet been reached, the Court viewed the employer's actions as essentially harmonious with the bargaining position of

the Union and refused enforcement of the Board's bargaining order. The Court said at 192 F.2d 150:

> "The allowances [by the employer] were concessions made in response to the requests of the Union. True, they did not include allowance of all the demands, but, as to those which were not allowed, the correspondence and the record as a whole indicate clearly that it was contemplated that the parties would continue to bargain and negotiate as to the balance of the Union requests and as to the form of a new contract. Surely such action constituted no deprivation of or interference with the rights of the employees and no interference with their bargaining agent, but was in fact merely concession as to part of the requests made, thus avoiding the necessity of further negotiation with respect thereto."

The *ratio decidendi* of all the foregoing cases should have guided the Seventh Circuit to precisely the opposite conclusion from that which it reached here. In each case, it was recognized that an employer's implementation of proposals in mid-term negotiations would necessarily inhibit or foreclose bargaining table discussions of such proposals and thereby undermine the negotiating process. Here, by contrast, there *was* discussion and agreement at the bargaining table and there is no showing that the employer's implementing action curtailed the process of free collective bargaining. If the Court in *Washfountain* was correct in upholding the employer's implementation of partial concessions to Union demands on the theory such concessions were harmonious with the Union's position, *a fortiori* the case at hand involving tentative *agreement* provides a stronger basis for the employer's actions. Having highlighted the most nearly analogous cases dealing with the issue at hand we now turn briefly to the three assailed actions and the tentative agreements pertaining thereto.

A. *The Warning Ticket System.*

If the Company's disciplinary program was indeed materially "changed," which we deny, (see Argument II, infra) there is still abundant evidence of Union agreement which would support the Company's action. Of the two Union expressions of assent concerning the warning ticket disciplinary system, one (the bargaining table agreement of October 24, 1975) is apparently conceded while the other (meeting of September 18, 1975) has occasioned much dispute. With regard to the September 18th agreement, the Board advanced the tortured theory that International Representative Haderly agreed to the continued use of warning notices *only on the condition his membership would be immune from disciplinary consequences.* This invention finds no persuasive support in the record and it surely defies common sense. In any event, the Board and Court have virtually disregarded the following:

(a) Within a few days after the disputed September 18th meeting in which Haderly approved the use of warning notices, the Union *again* evidenced its approval of such warning notices by proposing contract language to the Company which included, *inter alia,* the following:

> "SECTION 12.3. A copy of any *written warning notice* or reprimand shall be given to the Chairperson of the Shop Committee.
>
> SECTION 12.4. All *written warning notices* or reprimands shall be null and void *for disciplinary purposes* after twelve (12) months from the date of the occurrence giving rise to the written warning or reprimand." (emphasis added)

This Union proposed language was subsequently agreed to by the Company in the negotiations (meeting of October 24, 1975) and became the basis of the Disciplinary Article which the parties approved subject only to Union membership ratification.

(b) Prior to the September 18th meeting employees had received not only warnings but *disciplinary suspensions* through the use of warning tickets.

(c) On or after October 24, 1975, the Union reaffirmed its approval of the Disciplinary Article including warning notice usage. Such approval took the form of Haderly's "Okay" placed in the margin of his copy of the Disciplinary Article.

Assuming, *arguendo,* and contrary to logic, that on September 18 Haderly gave less-than-complete approval to the Company's warning notice program as it had evolved in late summer, 1975, it is nevertheless clear that the Union repeatedly acquiesced in such system and evidenced its acquiescence by a series of overt acts including its own contract proposal subsequently accepted by the Company which sanctioned the use of warning notices.

Despite this showing that the Employer did not act unilaterally, the Court's order would force the Employer to its knees by invalidating its entire disciplinary system including scores of disciplinary notices not separately considered on their merits at the time of trial. All this would be done, apparently, on a theory that use of warning tickets should have been "rebargained" with the Union. Since the matter of disciplinary format was fully negotiated, approved, and reapproved during the collective bargaining, it is difficult to see how a bargaining order would be meaningful in the present circumstances other than to inflict further punishment upon the Employer.

B. *The Layoff.*

The instant decision is premised on the general rule that Section 8(d) of the Act requires an employer to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment and that a correlative of this duty is the obligation of an employer to refrain from unilaterally changing established

terms and conditions of employment without first consulting and bargaining with the employees' representatives. Petitioner does not differ with that statement of the law, but rather submits that Electri-Flex Company has fulfilled its obligations under the law just as it did on its disciplinary format.

The action of the Company in conducting the layoff in question was not "unilateral action" in the sense of failing to bargain with the Union before taking action, but rather involved the application of seniority provisions which had been fully negotiated and agreed to by both the Company and the Union at the bargaining table. Although in theory, the provisions were tentative and perhaps subject to further negotiation under unforeseen circumstances, the parties had engaged in comprehensive bargaining over the provisions, and there was no indication or likelihood that further bargaining on such non-economic issues would occur. In any event, the negotiations of the parties were ongoing during the period of the disputed actions and there is no reason to suppose that the Union would have been deprived of the ability to re-initiate discussions on these issues if circumstances later dictated further adjustments. Cf. *Washfountain, supra* at 192 F.2d 150-151. Even if, as the Seventh Circuit stressed in the instant case, there *was* a theoretical possibility that tentative agreements would be reopened, we fail to see how the Company's action inhibited the Union's freedom of action or weakened its bargaining position.

Implicit in the dispute concerning the layoff is the theory that the Company's "unilateral" action abrogated the seniority and recall rights of its employees. This theory is fallacious *since there were no prior seniority and recall rights to abrogate.* Prior to the Union, the Company conducted its layoffs by laying off the least qualified employees regardless of seniority. During the negotiations with the Union, the Company granted liberal seniority and bumping

rights and adopted a system based on the last-date-of-hire concept proposed by the Union which read as follows:

> "SECTION 7.1. Seniority shall be defined as an employee's length of continuous service in years, months and days *since the date of his last hire.* (emphasis added).

Thus, by applying the tentative contract provisions, the Employer was granting rather than abrogating seniority and recall rights and was conducting the layoff in accordance with an agreed seniority concept first proposed by the employees' bargaining representative itself.

The Court's decision notes that at a meeting in January, 1976 concerning the layoff, Marrero produced a letter showing that he had been hired by the Company on October 29, 1974. It was of course, this apparent "error" which induced the Company to remove Marrero's name from the layoff list pending a review of employee file jackets. It was then discovered that Marrero started work on October 29, 1974, and worked continuously for only 37 days until he was terminated for lack of work on December 6, 1974. He then was off Electri-Flex's payroll for 122 days before being rehired on April 8, 1975. Thus, Marrero was off work for a period of time three times longer than his initial period of employment and under no stretch of the imagination can he be considered to have been employed by Electri-Flex "since October 29, 1974."

Much is made of the 60 day probation feature of the Company's so-called unilateral seniority plan and the notion it was "retroactively applied."[4] Yet, there are other separate and distinct seniority provisions adopted by the Company and the Union, which prevented Marrero from bridging his

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[4] We submit there is nothing "retroactive" about the application, to a *present* reduction in force, of newly negotiated seniority provisions which necessarily requires a look backward at each employee's term of service with the Company.

seniority across the 122 day gap back to October 29, 1974, since he had been off work for a period longer than his previous period of employment with the Company. Thus, the treatment of Marrero did not depend on a 60 day probationary test. He was equally disqualified by the Union's own last-date-of-hire language and by the clause relating to the length of previous layoff.

In the proceedings below, the Board suggested that the Company was "having its cake and eating it too" since it was not bound in any way by such tentative provisions. Petitioner submits that the Company was indeed bound by the "tentative" contract provisions and would have been vulnerable to unfair labor practice charges had it sought to withdraw such provisions from the bargaining table. In *American Seating Company of Mississippi* v. *NLRB,* 424 F.2d 106, 108 (5th Cir. 1970), the Court stated:

> "It is well established that withdrawal by the employer of contract proposals, tentatively agreed to by both the employer and the Union in earlier bargaining sessions, without good cause, is evidence of a lack of good faith bargaining by the employer in violation of Section 8(a)(5) of the Act, regardless of whether the proposals constituted valid offers subject to acceptance under traditional contract law."

The Company's dilemma is also illustrated by the fact that had it chosen to ignore the tentative contract provisions by conducting the layoff in accordance with its past practice of retaining the best qualified employees regardless of seniority, the Union surely would have charged the Company with bad faith avoidance of negotiated layoff procedures.

Thus, the Court's decision places the Company in a position of being "damned if it does and damned it it doesn't." The Court's interpretation of the law places an employer, who has granted concessions from past practices during contract negotiations subject to ratification, in the untenable position of being powerless to implement such concessions as needed on the one hand or resorting to stricter past practice on the other, at the risk of incurring unfair labor practice charges. Surely the decision in this case does not further the policies of the Act of promoting collective bargaining between the parties when it enforces punitive action against an employer, who as the need arises and without objection by the union as to prematurity, implements procedures which have been fully bargained between the parties and which substantially benefit employees.

The Court appears to have found that the Union did not agree to base the layoff on any tentative agreements reached during the contract negotiations. If such an argument is true, then it is proper to ask what lodestar the Union was following in its series of meetings with the Company other than its own ad hoc theories on how to spare its shop chairman from inclusion in the group being laid off. In reality, the Union well-knew what principles were being applied. Indeed, the Union followed these principles in all respects including bumping, and recall, departing from the tentative agreement only when Marrero's personal interests were threatened.

The correct interpretation of events is that the Union agreed to the application of the tentative provisions as suggested by the Company at the Federal Mediator's office, realizing that this would be of greater benefit to the employees than a layoff based solely on Company needs. At the meeting in January, 1976, confusion arose over the correct application of the tentative provisions and the Company was persuaded that Marrero's "correct" seniority date was October 29, 1974. It was only when the Company reviewed the files and layoff provisions with its counsel and subsequently advised the Union that the application of the provisions would indeed result in Marrero's layoff, that the Union strenuously objected to the application of the provisions.

C. *The Call-In Rule.*

The Court found, in effect, that the Company "unilaterally" instituted a "new" call-in rule in violation of Sections 8(a)(5) and (1) of the Act. Here again, the Board sought and received a wholesale nullification of numerous disciplinary actions taken by the Company under said rule on a theory that the Company had no right to liberalize its practices to conform with the Union's demands at the bargaining table.

Prior to the coming of the Union, the Company enforced a strict written call-in rule which specifically warned both English and Spanish speaking employees that violations would subject them to discharge. Indeed, numerous employees were discharged before the Union's arrival for not notifying the Company of their absences prior to 9:00 A.M.

The Union asserted that the Company's call-in rule was too harsh and during the contract negotiations adamantly insisted upon a liberalized rule based on progressive discipline. For example, the minutes of negotiations contain the following dialogue paraphrasing Haderly (indicated as "U") and the Company's negotiator:

> "U—[Pre-existing Rule] Doesn't fit into progressive disciplinary action.
>
> TB—Thinks it does.
>
> U—One time deal and the man could be dead.
>
> TB—Necessary to know if employee will be there. Common courtesy to call in. Needed for scheduling of work.
>
> U—Doesn't want one time deal where man can be fired."

After lengthy negotiations, agreement was reached on a liberalized rule which required that an employee call within four hours of the start of his shift and which included

progressive discipline concepts. Shortly after the tentative agreement was reached the Company implemented the new rule and prior to the hearing in the subject cases, the Union never complained of such implementation or suggested the Company acted prematurely.

Once again the Employer is placed on the horns of a dilemma. The call-in rule was a subject of heated debate during contract negotiations. If the Company had not implemented the new rule after agreement was reached with the Union, but rather had discharged an employee for not calling in within two hours as required by the old rule, the Union would have strenuously objected and surely would have filed unfair labor practice charges. Yet, when the Company implements the new, liberalized rule after a negotiated solution with the Union (and without subsequent objection from the Union) it stands accused of taking unilateral action in violation of Section 8(a)(5). We submit that such actions did not constitute unlawful unilateral action within the meaning and the spirit of the Act.

D. *No Union Prohibition Regarding Interim Implementation of Agreed Measures.*

As noted earlier, the Seventh Circuit's ultimate decision to uphold bargaining orders against the Employer on the three assailed actions relied heavily on the existence of a supposed Union "stipulation" barring any Company action before ratification. Specifically, the Court found that the Union's negotiator, Haderly, had prescribed that "no agreement reached during negotiations was *effective* until ratified by employees." (A-80; emphasis added)

It is of critical importance to compare the foregoing language of the Court with Haderly's actual testimony, for this is *not* what he said. He testified:

> "The Company gave us their proposals, and once again I reminded [the Company negotiator] of our policy, that anything we had settled in those negotia-

tions were tentative subject to final ratification by the membership."

There is no warrant in concluding from this general reminder about Union ratification procedures that the Union was thereby precluding any and all implementation steps before the final vote was taken. Indeed, it is clear that the Union did not mean this because it never took issue with the Employer's actions from a standpoint of timing or prematurity.

Clearly, Haderly was merely voicing a concept true of nearly all collective bargaining negotiations—that finality of agreement depends on a vote of the membership. Indeed, this is a tenuous basis upon which to let stand a bargaining order against an employer which the Court tacitly acknowledged would otherwise be unwarranted.

II. THE INCREASED RELIANCE ON WARNING TICKET USAGE WITH CORRESPONDING MODERATION OF OVERALL DISCIPLINE DID NOT INVOLVE THE INTRODUCTION OF ANY PREVIOUSLY UNUSED DISCIPLINARY TECHNIQUE AND THUS, WAS NOT A "CHANGE" REQUIRING BARGAINING; NOR WAS IT RETALIATION IN VIOLATION OF SECTION 8(A)(3).

Although the above discussion shows the Union agreed to the Employer's written, progressive disciplinary system on two occasions during contract negotiations, there is another, independent reason for reversal of the findings below that the system was unilaterally instituted in violation of Section 8(a)(5) and was a retaliatory measure in violation of Sections 8(a)(3) of the Act.

This reason is the clear and convincing evidence of record that the disciplinary system was not "new" as of August, 1975 but had been in existence and had been utilized prior to the arrival of the Union.

A. *The Misdescription of Past Discipline.*

The Court of Appeals description of the Employer's pre-union disciplinary system as primarily verbal (A-73) may leave the impression that nothing of any consequence was done in the disciplinary area prior to the arrival of the Union. As the decisions below would have it, the Company's pre-election "system" simply consisted of an absence of warning tickets while the post-election system consisted of the issuance of many such tickets. Such selective treatment of the pre-union warning notices produced at trial so distorts the true pre-union disciplinary atmosphere that we offer, for the Court's consideration, the following compilation which shows the *totality* of the pre-union situation:

KNOWN PRE-UNION DISCIPLINARY ACTIONS OF COMPANY AS ESTABLISHED BY EVIDENCE

Exhibit Number or Source	Supervisor	Date	Infraction	Documentation, If Any	Suspension or Termination, If Any
R9(a)	Bonner	1/3/73	Bad Attitude	Warning Slip	None
R9(b)	Westlake	1973	Repeated Lateness and negligence on machine	Warning Slip	1 day off
R9(c)	Garcia	3/4/74	Safety-stopping machine with foot	Warning Slip	None
R9(d)	Garcia	3/12/74	Same	Warning Slip	None
R9(e)	Garcia	4/2/74	Same	Warning Slip	None
R9(f)	Garcia	4/22/74	Same	Warning Slip	None
R9(g)	Shields	4/30/74	Safety—no glasses	Warning Slip	None
R9(h)	Shields	5/15/74	Safety—no glasses	Warning Slip	None
R9(i)	Rivera	1974	Safety—no glasses	Warning Slip	None
R9(j)	Colosi	12/13/74	Carelessness	Warning Slip	1 day off
R9(k)	Bongiovanni	2/10/75	Safety—no gloves	Warning Slip	1 day off
R9(l)	Bongiovanni	2/13/75	Misconduct to foreman	Warning Slip	3 days off
R9(n)	Shields	Undated	Safety—no glasses	Warning Slip	None
Tr. 823-24; 1283	Caban	8/74	Negligent use of lift truck	None discovered	1 week off

Exhibit Number or Source	Supervisor	Date	Infraction	Documentation, If Any	Suspension or Termination, If Any
Tr. 145	Rivera	1974	3 or 4 warning slips issued for safety	Only one discovered (G.C. Ex. 11)	None
Tr. 1278	Caban	1973-74	Safety—no protective shoes (Matias)	None discovered	1 day off
Tr. 1278	Caban	1973-74	Safety—no protective shoes (Couvarubias)	None discovered	1 day off
R15(a)	Bonner	11/7/72	Absent from work without permission	Termination Slip	Fired
R15(b)	W. Negron	12/13/73	Bad Conduct	Payroll change notice	(Pay cut)
R15(c)	Redfern	1/22/74	Fighting in Violation of Company rule	Termination Slip	Fired
R15(d)	Guidi	5/7/74	Took time off without call-in	Termination Slip	Fired
R15(e)	Guidi	5/16/74	Time off work without calling in	Termination Slip	Fired
R15(f)	Shields	5/16/74	Refused to leave building after warning notice given; removed by police	Termination Slip	Fired
R15(g)	Bonner	6/3/74	Poor Attitude, lazy	Termination Slip	Fired
R15(i)	Bonner	8/7/74	Poor Attendance	Termination Slip	Fired
R15(j)	McHenry	8/1/74	Failure to call in while sick for 2 days	Termination Slip	Fired
R15(l)	Caban	8/6/74	Failure to wear safety glasses	Termination Slip	Fired
R15(m)	Bongiovanni	8/6/74	Didn't call in for 2 days	Termination Slip	Fired
R15(n)	Caban	8/7/74	Can't take orders	Termination Slip	Fired
R15(o)	Rivera	8/8/74	Poor Attendance	Termination Slip	Fired
R15(p)	Rivera	8/8/74	Poor Performance	Termination Slip	Fired
R15(q)	Morgan	8/8/74	Leaving machine and reading on job	Handwritten Memo	Fired
R15(s)	Guidi	8/13/74	Failed to call in absence for 2 days	Termination Slip	Fired
R15(t)	Guidi	8/14/74	Didn't call or come in	Termination Slip	Fired
R15(u)	Guidi	8/14/74	Didn't listen to Superintendent	Termination Slip	Fired
R15(v)	Tornblum	8/15/74	Poor attendance and safety violations	Termination Slip	Fired
R15(x)	Bonner	8/19/74	Poor attitude—won't obey Company rules	Termination Slip	Fired

Exhibit Number or Source	Supervisor	Date	Infraction	Documentation, If Any	Suspension or Termination, If Any
R15(y)	Bonner	8/19/74	Poor Attitude	Termination Slip	Fired
R15(z)	Rivera	8/20/74	Poor work performance	Termination Slip	Fired
R15(a)(a)	Brilz	8/20/74	Too slow on job	Termination Slip	Fired
R15(b)(b)	Williams	8/21/74	Time off without calling in	Termination Slip	Fired
R15(c)(c)	Guidi	8/28/74	Too much time off work	Termination Slip	Fired
R15(d)(d)	Rivera	9/11/74	Didn't call in	Termination Slip	Fired
R15(e)(e)	Brilz	9/5/74	Didn't do the job	Termination Slip	Fired
R15(f)(f)	Caban	9/12/74	Can't take orders	Termination Slip	Fired
R15(g)(g)	Caban	9/12/74	Doesn't work—just walks around	Termination Slip	Fired
R15(h)(h)	Brilz	9/13/74	Poor work and attitude	Termination Slip	Fired
R15(i)(i)	Colosi	9/24/74	Disobedience to supervsor	Termination Slip	Fired
R15(j)(j)	Bongiovanni	9/26/74	Too much time off	Termination Slip	Fired
R15(k)(k)	Guidi	10/10/74	Didn't come in or call	Termination Slip	Fired
R15(l)(l)	Caban	10/15/74	Not doing the work	Termination Slip	Fired
R15(m)(m)	Bongiovanni	10/28/74	Poor work	Termination Slip	Fired
R15(n)(n)	Bongiovanni	11/7/74	Misuse of lift truck	Termination Slip	Fired
R15(p)(p)	Guidi	12/20/74	Failure to comply with rules	Termination Slip	Fired
R15(q)(q)	W. Negron	3/12/75	Would not follow orders	Termination Slip	Fired
Tr. 276	Bily	7/9/75	Unknown	Warning Slip	None
G.C. 128	Guidi	7/22/75	Conduct	Warning Slip	None

Viewing the above system in its totality, the issue, properly framed, should be: Did the Employer, after certification of the Union, resort to new, previously unused disciplinary measures or, contrariwise, did it refine, adjust and improve the use of the above procedures previously employed? Clearly, it was the latter which occurred.

The ALJ's Decision branded the Company's post-union disciplinary system as a nullity under a blanket Section 8(a)(5) theory, but it assiduously avoided any finding that the system was retaliatory, as a blanket Section 8(a)(3) matter. This is so for good reason. At least on the 8(a)(3) issue, the ALJ correctly perceived that such a finding could not be sustained because the coming of the Union had a

moderating effect on the Company's overall disciplinary orientation. As much cannot be said for the Board and the Court of Appeals, since the Board modified the Decision to include Section 8(a)(3) as a second basis of violation, and the Court of Appeals enforced the Decision and Order of the Board.

Certainly, the conceded increase in frequency of warning ticket use after August of 1975, while not a unilateral change under Section 8(a)(5), might have constituted a Section 8(a)(3) violation if the overall effect was a discriminatory intensification of the disciplinary atmosphere at Electri-Flex. However, the Court fails to show how it is that discipline intensified with the increased use of warning notices in this particular case.

The error of this finding is apparent. Prior to the Union, employees were much more at their peril for disobeying rules than they were thereafter. The fact that the environment at Electri-Flex became less hazardous for marginal employees is demonstrated by the testimony of International Union's own officer, Lee Parker, who characterized the pre-union atmosphere as follows:

> "'I had the impression that they didn't have any other [discipline] than (sic) just fired people***.
>
> "The supervisors were riding them all the time. . . ."

The reduced severity of discipline is also readily apparent from the striking difference in rate of attrition before and after the arrival of the Union. The above tabulation shows that excluding those separation notices which are ambiguous as to reason, over 35 employees were *fired* for a wide variety of causes in the space of one year, 1974. By contrast, the record shows only 4 terminations (Kwasniewski, Carlson, Capasso and Martin) which occurred between July 1, 1975 and the date of trial.[5] Thus,

[5] From the outset, the NLRB has not alleged that two of these, Kwasniewski and Carlson, were improperly fired.

the termination rate for this 9½ month period was but a small fraction of the previous rate. If a system is to be branded as "retaliatory" it must have that effect. Obviously, if the evolution of the Company's system is fairly weighed, the effect was just the opposite of retaliation.

In his Decision, the ALJ found that an alleged conversation between Company supervisory personnel Bonner and Colosi had been undenied by Company witnesses and, therefore, had occurred. (A-20)

The Board and the Court of Appeals seized on this erroneous finding of the ALJ and made it the very foundation of the Board's additional finding that the Company invented a "new" disciplinary system as a retaliatory weapon against union adherents in violation of Section 8(a)(3) of the Act.

Petitioner submits that in addition to correcting the errors below which failed to properly assess the effect of tentative agreement, this Court should also reverse this patently erroneous factual finding and the asserted violation of the Act based upon it. The record shows that Superintendent Colosi, when questioned about this alleged conversation, emphatically denied that it occurred as follows:

> Q. Do you recall talking to Larry Bonner about getting rid of union people on or about that date?
>
> A. I never would make a statement like that.
>
> Q. You don't recall making that statement—
>
> A. No, sir.
>
> Q. —to Larry Bonner?
>
> Do you recall talking to Mr. Bonner about overthrowing the union on about that date?
>
> A. Absolutely not.

The finding of the Board, based on an erroneous finding that the conversation was not denied, cannot stand.

It is clear, then, that Section 8(a)(3) was not an option realistically available for blanket nullification of the Company's program. As we will now show, the unilateral action theory under Section 8(a)(5) is equally inapplicable, since no material change in methods of discipline took place.

B. *No Material Unilateral "Change" is Present.*

The increased use of warning tickets and suspensions which commenced around August of 1975 with corresponding sharp decreases in firings perhaps altered the pre-existing system as a matter of degree but it was not a change of kind. In its comment concerning the definitions of "change" *Webster's New Collegiate Dictionary* (1961) states as follows at page 138:

> "Change implies either an *essential difference,* sometimes amounting to a loss of identity, or the substitution of one thing for another. . . ." (emphasis added)

Before the coming of the Union, Electri-Flex indeed had a warning ticket system. Standard Form 4328 had been in use since 1972 and had been applied in a variety of situations including safety, poor attitude, lateness, carelessness and misconduct to foremen. The above tabulation shows that suspensions, likewise, were a tool of discipline in use long before the arrival of the Union.

Moreover, contrary to implications made in the Decisions under review, the Company's formal work rules were not changed or augmented subsequent to 1974.

Insofar as there was an increase of warning notices in the summer of 1975, it involved a quantitative, rather than a qualitative, change in the Company's program. We submit that for purposes of Section 8(a)(5) analysis, the law does recognize a distinction between the two. For example, in *NLRB* v. *W. L. Rives Company, et al.,* 328 F.2d 464 (1964), an employer's unilateral transfer of certain production work resulting in an increased volume of tasks for certain

production employees was challenged under Section 8(a)(5). The court refused enforcement of the Board's bargaining order saying at page 470:

> "The only effect on the employees . . . operations was an *increase* in work because of the employer's ability to obtain more contracts. There are no indications of any planned change in the number of employees at the Rives Company plant . . . or in their manner of performance. In each of the cases where a change in the conditions of employment was found, there was a change in either the wages or benefits given the employees, the length or term of employment or the *type* of work performed. Of course, there might be additional ways in which the conditions of employment would be changed, but we hold that a mere planned *increase in the volume* of work to be performed by some of the employees because of a planned increase in the volume of the employer's business, by itself, is not an action which requires prior notice and consultation with the exclusive bargaining agent." (emphasis added)

Since the Company introduced no new disciplinary method which was not actually in use prior to the coming of the Union, no qualitative "change" occurred of legal significance within the meaning of Section 8(a)(5). The principal cases relied upon below, namely, *Murphy Diesel Company,* 184 NLRB No. 87, 76 LRRM 1469 (1970) and *Amoco Chemicals Corp.,* 211 NLRB No. 618 (affirmed sub nom *NLRB* v. *Amoco Chemicals Corp.,* 529 F.2d 427 (5th Cir. 1976) do not justify a different conclusion.

Unlike the instant case where substantive work rules remained unchanged, *Murphy* involved the alteration of the content of an employer's disciplinary rules. *Amoco's* finding of unilateral action rested on clear evidence of total abandonment of a disciplinary system nearly a full year before certification of the union (529 F.2d at 431). Also

central to the *Amoco* decision was the finding that employee job security was jeopardized by the new practice of filing disciplinary documents with employee records. By contrast, there was no abandonment and subsequent revival of previous methods at Electri-Flex and job security for all employees improved markedly as the Company gave greater emphasis to stepped-discipline concepts and warnings instead of peremptory discharges.

A more appropriate comparison to the instant case is *Wabash Transformer Corp.*, 215 NLRB No. 101, 88 LRRM 1511 (1974) where the "starting of a program" for production efficiency enforced by disciplinary measures (88 LRRM at 1511) was not deemed a material departure from previous established methods. The Board noted, at 88 LRRM 1512:

> "It is clear that Respondent did not promulgate new productivity rules or standards, as the existence of the efficiency standards *predated* the union's . . . certification. Furthermore, this is not a case where work rules have been abandoned and subsequently revived and invoked. . . ."
>
> * * * *
>
> "Under the above circumstances we conclude that the discharge sanction was merely one means of enforcing the pre-existing efficiency standards which was implicit in the existence of any such standard. The *emphasizing* of this means did not constitute unlawful unilateral action. . . ." (emphasis added)

In the instant case, the increased resort to warning notices as a mode of discipline "was implicit in the existence of" the previous program, and the "emphasizing" of one means of discipline (warning notices) as opposed to other measures (i.e. discharge) did not constitute unlawful unilateral action.

CONCLUSION

The United States Supreme Court should issue the Writ of Certiorari prayed for by Petitioners.

Dated this 27th day of July, 1978.

Respectfully submitted,

THOMAS D. BURLAGE
SAMUEL W. WITWER, JR.
R. DENNIS CLAESSENS

Attorneys for Petitioners

Of Counsel:

WITWER, MORAN, BURLAGE & ATKINSON
125 South Wacker Dr.
Chicago, Illinois 60606
(312) 332-6000

APPENDIX

Decision of Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ELECTRI-FLEX COMPANY

and

DISTRICT NO. 122, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Cases 13-CA-14739
13-CA-15036

DECISION

Statement of the Case

JOHN M. DYER, Administrative Law Judge: District No. 122, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union or IAM, filed charges and amended charges in the above two cases between October 1, 1975, and March 8, 1976,[1] against Electri-Flex Company, herein called Respondent or the Company, alleging that Respondent violated Sections 8(a)(1), (3) and (5) of the Act.[2] An Order Consolidating Cases following issuance of Complaints and Amended Complaints in these cases was issued by the Acting Regional Director for Region 13 on March 8. The Complaint in Case 13-CA-14379 was thereafter amended prior to the hearing and during the hearing of this matter.

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1. Unless specifically stated otherwise, the events in this case took place from June 1975 through the early months of 1976.

2. An allegation of a Section 8(a)(4) violation was added during the hearing in this matter.

In essence, the Complaints allege that Respondent committed numerous violations of Section 8(a)(1) by interrogating and threatening employees and making promises of benefit and violated Section 8(a)(5), (3) and (1) by instituting a new or different disciplinary system after the Union won a Board conducted representation election and thereafter disciplined, discharged or laid employees off to retaliate against them for choosing the Union as their collective-bargaining representative.

Respondent's Answers to the Complaints and Amended Complaints admitted the commerce and jurisdictional allegations, the supervisory status of its foremen and officers, and that the Union won the representation election on August 7, and was certified on August 15. Although originally admitting that Respondent had, around August 8, instituted a system of written warning notices and discipline and began to enforce it, Respondent later amended its Answer to deny this allegation stating that the warning and disciplinary systems had been in effect prior to that time and had only been amplified and made more consistent around the time of the election. Respondent denied committing the extensive 8(a)(1) allegations but admitted the various discharges and transfers of employees, but denied that such were violative of the Act. It admitted issuing the written warning notices set forth in the complaint and thereafter amended into the complaint. Respondent denied that it had violated Sections 8(a)(3) and (5) but later conceded that some of its supervisors had violated Section 8(a)(1).

Since a major portion of the 8(a)(1) allegations is not specifically denied, the principal question in the case is whether Respondent's warning system and its effectuation and the several discharges, layoffs and suspensions violated the Act. On the basis of all the evidence, I have concluded that Respondent unilaterally established a system which

really had not been in use, and thereby violated Sections 8(a)(5), and (1) of the Act. I have also found that the suspensions, discharges and layoffs were, with one exception, violative of the Act.

The parties were afforded full opportunity to appear, to examine and cross-examine witnesses and to argue orally at the hearing in this matter held in Chicago, Illinois, on April 13, 14, 15, 16, 20, 21, 22, 23 and May 10, 11, 12, 13 and 14, 1976. General Counsel and Respondent filed extensive, careful briefs which have been fully considered.

On the entire record in this case, including the exhibits and the testimony offered and on my evaluation of the reliability of the witnesses based on both the evidence and their demeanor, I make the following:

Findings of Fact

I. Commerce Findings and Union Status

Electri-Flex Company is an Illinois corporation engaged in manufacturing flexible electrical conduit, with its principal office and place of business in Roselle, Illinois, where, during the past year, it purchased and received goods and materials directly from points outside the State of Illinois which were valued in excess of $50,000.

Respondent admits, and I find, that it is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

Respondent admits, and I find, that the Union herein is a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. Background and Facts

The Company stated in a cover sheet on a document given to its employees, that it was . . . "the second largest producer of flexible, liquid-tight conduit in the world" and that it had been in business for 20 years at its Roselle plant. The Company slits the raw steel into proper size and then produces its product by coiling narrow strips of galvanized steel into a flexible tube which is then covered by extruding polyvinyl chloride over the flexible tube. This conduit is used in the machine-tool, construction and maintenance industries where there is a need for moisture-proof, water proof and oil tight electrical cable.

The Company is owned and operated by the Kinander family, with West Kinander, the president of the corporation; his brother, Bruce, the vice president, and their father, the chairman of the board. In June 1975, Respondent had a total complement of approximately 70 employees with about three-fourths of them Spanish-speaking employees of Puerto Rican and Mexican extraction. Some of the employees speak only Spanish and a number of the supervisors' principal language is Spanish, so that both some of the employees and the supervisors needed the services of an interpreter to testify.

The supervisory setup in 1975 under the Kinanders consisted of Mario Colosi, the manufacturing manager with some five departments under him, and Larry Bonner as superintendent over the extruding and shipping departments. Reporting to Bonner were Bob Bily, foreman in extruding, and Celestino "Tino" Hernandez, the foreman of the shipping department. Reporting to Colosi were Luis Caban, foreman of the square lock department; Greg "Poncho" Bongiovanni, foreman of the interlock department; Enrique Garcia, foreman of the slitting department;

Ed Brilz, foreman of the toolroom and Casmir "Casey" Stawinski, foreman of the maintenance department. In addition to the day shift, there was a small night shift under Foreman Marvin Detrick.

On its managerial staff the Company had Dean Guidi, its in-plant purchasing agent, who on occasion signed warning slips and Plant Engineer Ducette. Under the foremen were a number of "set-up" men who were charged with repairing and maintenance of the various pieces of machinery and they would sometimes fill in for absent foremen and instruct employees in the use of machines or safety equipment and sign warning slips. There were between six and ten "set-up men" prior to the August election and they had authority from Respondent to warn employees about any derelictions they observed. This practice was stopped after the election.

In January 1976, Respondent offered Larry Bonner a job in the office where he would not have contact with the employees. Bruce Kinander testified that the job was offered to Bonner because the job happened to be open and because Bonner continued to have animosity toward the Union and the outcome of the election and continued to interrogate employees concerning the Union. Kinander stated he felt it was best to remove Bonner from direct supervision of the bargaining unit people and union members. At that point Colosi became Plant Superintendent in charge of all seven plant departments. It is noted that Bonner was not produced to testify by Respondent and there was no explanation offered for his nonproduction, and, consequently there was no denial of the numerous allegations of 8(a)(1) attributed to him. Similarly, Foreman Greg Bongiovanni did not testify for Respondent and there was no explanation for his nonproduction as a witness and the allegations of 8(a)(1) concerning Bongiovanni are therefore undenied.

When some employee sentiment concerning organizing a union began in June 1975, employees Ignacio Marrero and Mariano Rivera went to the offices of the Union to discuss organizing a union at Respondent. Business Representative Haderly talked to them and contacted Union Representative Parker who assisted them in organizing and set up a second meeting for Friday, June 13. At this meeting Parker met with Rivera, Marrero and employee Teofilo Lopez and discussed what was necessary to organize a union and explained about procedures of filling out union authorization cards. Rivera, Marrero and Lopez signed cards and were given cards to distribute to other employees. They said the employees were fearful of losing their jobs and would not admit organizing a union if they were asked although Parker advised them that would be their best defense. Parker then advised them to tell the employees to deny any knowledge of the Union if they were asked by Respondent.

The Union held a meeting on June 21 which some 40 or more Spanish-speaking employees attended. After listening to speeches concerning the Union, a number of the employees signed authorization cards. On June 26, the Union filed a representation petition with the Regional Board Office and, on July 9, a Stipulation for Consent Election was signed setting the election for August 7. The Union won the election 44-11 with the certification issuing on August 15 and the first negotiation meeting taking place on September 26. As of the time of the hearing in this matter the parties had not agreed on a contract.

B. The 8(a)(1) Violations

It was noted above that neither Larry Bonner nor Greg Bongiovanni appeared at the hearing or testified and as a consequence the 8(a)(1) allegations against them are undenied and, there appearing to be no reason to discredit

those who testified that these statements were made, I find that they occurred as they are listed below. I find that by Supervisors Bongiovanni and Bonner making these statements Respondent violated Section 8(a)(1) of the Act.

1. Around August 6, Bongiovanni interrogated Rivera by asking him who was going to vote for the Union.

2. Around July 31, Bongiovanni told Eleazor Hernandez that the Union was no good, would not bring him any benefits and that anyone who signed a union card would be fired and that if he knew that Hernandez signed a card, he would fire him.

3. Around August 7, Bongiovanni told Wilfredo Rosa that if the Union won, things would be harder, and even though Rosa could not vote, he would have to be with the Union.

4. Around August 6, Bongiovanni told Rivera that he knew who was voting for the Union.

5. Around August 11, Bongiovanni told Daniel Kwasniewski that things were going to get tough now that the Union had been voted in.

6. Larry Bonner on two occasions at the end of June and the beginning of July asked James Carlson if he had heard anything about the Union.

7. Around July 7, Larry Bonner, with Mario Colosi present, asked Nelson Acevedo if he was talking about the Union. Acevedo denied that he had been doing so.

8. Around July 10, Bonner, with Colosi present, asked Adrian Velez if he knew something about the Union.

9. Around July 13, Bonner asked Velez if he had signed a union card and who else had signed cards.

10. Around July 7, Bonner asked Hermanjildo Mendoza if he knew anything about the Union.

11. Around July 24, Bonner asked Mendoza if he was still against the Union and whether Carlson had given Mendoza a union card.

12. Around August 8, Bonner asked Mendoza why he had voted for the Union.

13. Around July 17, Bonner asked Perez if he liked the Union.

14. Around July 17, Bonner asked Negron Acevedo if he was in the Union.

15. On four or five occasions in July, Bonner asked Dick Rose if he was interested in the Union and if he knew who was involved or who was trying to bring in the Union.

16. Around August 8, Bonner asked Rose if he was part of the Union.

17. Around July 31, Bonner asked William Negron and again, around August 14, asked Negron and Marrero who had brought the Union into the plant.

18. On three or four occasions in July, Bonner asked Teofilo Lopez how he would vote and, around August 14, asked him how he had voted.

19. Around July 17, Bonner asked Rivera how he was doing with the Union.

20. Around August 21, Bonner asked Rivera who had voted for the Union.

21. Twice on September 4, Bonner asked Marrero, who was with William Negron, who brought in the Union.

22. Around July 17, Bonner told Rivera that the Union would hurt the employees and they would lose their benefits.

23. Around August 3 and 7, Bonner told Velez it would be better for him to vote for the Company.

24. Around August 3, Bonner told Velez that he had a list of how the employees would vote.

25. Around August 28, Bonner told Nelson Acevedo that he knew that he was not with the Company.

26. On August 8, Bonner told Rivera that there were going to be changes made because the Union had won the election.

27. Around August 12, Bonner told Velez that he did not worry about the Union because the Company had a way to resolve the problem. (See 32 f. *infra.*)

28. On August 8, Bonner told Mendoza that Colosi would be worse than he had been because the Union had won the election.

29. On August 8, Bonner told Rose that things were going to be different now that the Union had been voted in.

30. On August 8, Bonner told Rose that if he knew who voted for the Union, he would take good care of them and put them in management.

31. Foreman Enrique Garcia testified that Martin Ibarra on one occasion asked his opinion of the Union but that he did not give it. He did not specifically deny Ibarra's credited testimony that around July 31, he had asked Ibarra whether Ibarra was attending union meetings. Garcia did not recall the occasion testified to by Juan Munoz, that during July, Garcia had told Munoz that it would not be good for him to vote for the Union because the Union would not give them raises until after a year had gone by and the men were working hard.

There being no denial of these statements, I find that Respondent through Garcia violated Section 8(a)(1) by interrogating Ibarra as to whether he was attending union meetings and threatened Munoz by stating that it would not

be good for him to vote for the Union because he would not get raises for a long period of time.

32. Foreman Luis Caban testified that he did not recall any conversations he had concerning the Union before the election. Caban did not deny having any such conversations. There being no specific denial of the testimony concerning statements made by Caban and there being no reason to doubt the credibility of the witnesses testifying as to what he said, I find that by the following statements and questions of Caban, Respondent violated Section 8(a)(1) of the Act.

a. Around the end of June, Caban asked Juan Munoz if he attended any union meetings and which other employees were attending those meetings.

b. Around July 17, Caban told William Negron that anyone who signed a union card would be fired one by one.

c. Around July 24, Caban told Teofilo Lopez that the Company would call the Immigration & Naturalization Service because some of the employees who were Mexican citizens were in favor of the Union.

d. Around July 24, Caban told Munoz that if the Company lost the election, Marrero and Velez would be the first to go and then the others would follow.

e. Around July 31, Caban told Juan Martin that if the Union lost the election, all of them would be fired.

f. Around August 6, Caban told Adrian Velez that if the Union lost the election everyone would be fired, that the employees would be transferred or pushd out one by one and that the Company had a good way to resolve the union problem.

g. Around the beginning of July, Caban told Munoz that he knew Munoz and Ibarra attended union meetings because he had been told so by another employee.

33. Caban did not deny that around August 11, he told Velez not to worry about the election results because they had a good way to resolve the problem. This threat of retaliation for union support violates Section 8(a)(1) of the Act and I so find and conclude. (See 32 f. *supra.*)

34. Caban did not deny, although talking around the point, that around August 21, he told William Negron that the Company was going to do something to put the Union out. This threat against the employees' bargaining representative violates Section 8(a)(1) of the Act and I so find and conclude.

35. I do not find an 8(a)(1) violation in regard to Caban's supposed statement to Aurecilio Feliciano, because the Complaint allegation places this event in October, some 2 months after the election and if the remarks occurred as Feliciano testified, it would certainly have had to have been some time prior to the election, some 2 months earlier. This allegation is therefore dismissed.

36. Mario Colosi did not deny the following items of interrogation and there being no reason to doubt the credibility of the witnesses who testified to them, I find that Respondent violated Section 8(a)(1) of the Act by the following remarks of Colosi:

a. In early July, Colosi asked James Carlson if he had heard about the Union.

b. Around July 13, Colosi asked Adrian Velez if it was true that he had signed a union card and who else had signed union cards.

c. Around July 30, with Bonner present, Colosi asked Flores if he knew anything about the Union.

d. On four or five occasions in July, Colosi asked Dick Rose if he was interested in the Union and who was trying to bring the Union in.

e. Around August 8, Colosi asked Rose if he knew who the 11 people were who voted against the Union and if he were one of them.

37. Colosi did not deny that around July 17, he told Rivera that the Union would hurt the employees and around July 24, told Velez that the Union was no good, that the employees would lose their profit sharing and that he should tell the other employees not to vote for the Union because he (Colosi) was the boss and could not do so. I find that these statements are threats violative of Section 8(a)(1) and that by Colosi making these undenied statements, Respondent violated Section 8(a)(1) of the Act.

38. Dick Rose testified that on four or five occasions in July, Colosi told him that things would change if the Union came in and the employees would lose all of their benefits. Colosi denied making these statements to Rose. However, these statements are of the same genre that Colosi made to Lopez and that other supervisors made to other employees and are part of a pattern of violative remarks. As will be detailed further, Colosi was not completely truthful in his testimony and I do not believe his denial of Rose's testimony. Therefore I find that Respondent violated Section 8(a)(1) of these threats of changes made to Rose by Colosi.

39. Mariano Rivera testified that in February 1976, he was given a 3-day layoff and protested to Colosi stating he should be paid for those 3 days. Colosi said he would not do so. When Rivera insisted, Colosi said, "Well, Mario, I'm sorry, you can do whatever you want. I'm your friend but for your own good, you had better not take it to the labor board." Colosi testified that he never said anything to Rivera about the labor board.

As stated above and as will be shown further below, Colosi was not a completely credible witness. Rivera was a union leader and known as such by Respondent. This

statement is in line with other statements by Colosi and other Respondent supervisors and I find no reason not to credit Rivera. I therefore find that the statement was made and that it constitutes a violation of Section 8(a)(1) by Respondent. Similar statements were made to Velez and Rosa and the testimony concerning them will be considered with the testimony concerning Velez' transfer and Rosa's layoff, *infra*.

40. James Carlson, who had been employed in the toolroom, testified that toward the end of June and again in early and mid-July, Supervisor Ed Brilz asked if he had heard about the Union, whether he knew who was bringing it in, how he would vote, and whether he went to union meetings. Brilz did not specifically deny asking Carlson these questions, but said in answer to a general question that he never asked the employees who was responsible for bringing in the Union. This reply is not a denial of Carlson's testimony. There appearing no reason to discredit Carlson and his testimony being undenied, I find and conclude that Respondent through Brilz' questions to Carlson violated Section 8(a)(1) of the Act.

41. Daniel Kwasniewski testified that around July 7 and 14 Supervisor Brilz asked how he felt about the Union. There is no denial of this interrogation and there being no reason to discredit Kwasniewski, I find that Respondent through Brilz' questioning of Kwasniewski violated Section 8(a)(1) of the Act.

42. Dick Rose testified that in mid-July Supervisor Brilz asked him who was bringing in the Union, who was involved in the Union and what Rose thought about the Union. There is no specific denial of Rose's testimony but only Brilz' general answer that he never asked who was responsible for bringing in the Union and this at most would cover only one part of Rose's testimony. As may be seen *supra*, this same type of question was being asked by

numerous other supervisors so that there is a pattern of interrogation at Respondent. Further, the related questions are not denied by Brilz and finding no reason to discredit Rose, I conclude and find that Brilz did ask the questions as Rose testified and that thereby Respondent violated Section 8(a)(1) of the Act.

43. Capasso testified that around July 10 Supervisor Brilz asked if he had heard about the Union and what he thought about it and around July 17 Brilz told Capasso that he wanted to know who favored the Union and a few days later asked Capasso if Carlson and Rose were for the Union Brilz' general denials do no touch this testimony and since the testimony is undenied and I have no reason to discredit Capasso that these events occurred as he testified, I conclude and find that Respondent through Brilz violated Section 8(a)(1) of the Act by these inquiries.

44. Keith Uelsmann testified that beginning in mid-July and running up to the election, Brilz asked him how he felt about the Union, if his feelings had changed about the Union and if he had decided how to vote. Brilz testified that he and Uelsmann talked about the Union and that Uelsmann asked him questions and he told Uelsmann to make up his own mind. Brilz' testimony is not a denial of Uelsmann's testimony and it being undenied and there appearing no reason to discredit Uelsmann, I conclude and find that Respondent through Brilz violated Section 8(a)(1) of the Act by his interrogations of Uelsmann.

45. James Carlson testified that around July 10 Brilz told him he would go by the book and make it rough on those trying to bring in the Union and a few days later said that the Union would hurt the employees at the Company. There is no specific denial of these statements and I conclude and find that Respondent through Brilz violated the Act by threatening to make things harder on

the union supporters and by telling Carlson that the Union would hurt the employees if it was installed at the Company.

46. Dick Rose testified that in a conversation where Brilz asked who was involved in the Union that Brilz also said he would like to make an example of the employees who were trying to bring the Union in. There is no specific denial of this testimony and finding no reason to discredit Rose I conclude and find that Respondent by Brilz violated Section 8(a)(1) of the Act by inquiring who the prounion employees were and by threatening to make an example of them.

47. Dick Rose testified that around July 31 Brilz told him that if the Union came in things would be different and the employees would lose all of their fringe benefits. Although Brilz stated that he never threatened that employees would lose their benefits if they voted for the Union, there is no specific denial of Rose's testimony. Here again the statements appear to be part of a pattern used by many of Respondent's supervisors and I conclude and find that the statements were made by Brilz and that thereby Respondent violated Section 8(a)(1) of the Act.

48. Keith Uelsmann testified that around mid-July Supervisor Brilz told him that if the Union came in, profit-sharing would go down the drain, working conditions would be tightened-up, there would be no more overtime and other changes would take place. Again around the end of July, Brilz told him if the Union came in there would be changes in the break system and just prior to the election Brilz said there would be changes in the employer-employees relationship and that employees would be watched. There is no specific denial of this testimony by Brilz and again it is similar to that indulged in by most of Respondent's supervisors. I conclude and find that it occurred as Uelsmann

testified and that Respondent thereby violated Section 8(a)(1) of the Act.

49. Capasso testified that around the end of July, Brilz told him that he had a book of rules and regulations and would make things rough on the union supporters. There is no specific denial of this testimony and I conclude it occurred as Capasso stated and that Respondent thereby violated Section 8(a)(1) of the Act.

50. James Carlson testified that near the beginning of July, Brilz told him that he had a list of the people who were bringing in the Union. There is no specific denial of this testimony and I conclude and find that it occurred and that thereby Respondent violated Section 8(a)(1) by creating an impression that it knew who the Union supporters were and was surveilling their activities and maintaining a list of prounion employees.

51. Rose testified that on August 8, the day after the election, Brilz said there would be changes in the hours and the break times and since the Union had won the election it would be a different ball game and they were on opposite sides. Rose told Brilz that Bruce Kinander had told him the day before that there would be no changes until the Company saw what the Union wanted. Brilz later stated there would be no changes. Keith Uelsmann testified that on that same date Brilz told him the very same things.

Respondent asked Brilz whether on the day after the election he had talked to Uelsmann about the results of the election and Brilz said no. This is not a denial of the testimony of Uelsmann or Rose. I conclude that there being no reason to discredit Uelsmann and Rose in this regard, that Brilz made the statements and that thereby Respondent violated Section 8(a)(1) of the Act by threatening reprisals to the employees for their support of the Union.

Further corroborating this type of 8(a)(1) was the testimony of Marrero who was not at work on August 8 but went in to pick up his paycheck and spoke with Juan Martin and Martin Ibarra who asked him what had happened saying that Supervisors Bongiovanni and Caban would not let the employees go to the bathroom or the cafeteria except at break. When they complained about it both Caban and Bongiovanni said they could not go and the Union agreed with them that this was the new rules. Marrero told the employees that there was no contract and that nothing like that should be occurring.

52. Capaso testified that around August 7, Brilz told him that the Company would take care of those who voted for the Company by placing them in management where they would not be hurt. There is no denial of this testimony and I conclude and find that Respondent violated Section 8(a)(1) of the Act by Brilz' statement that antiunion supporters would be rewarded.

53. Adrian Velez, Mariano Rivera, and Ignacio Marrero each testified that around August 5, Foreman Celestino "Tino" Hernandez told them separately that the three of them and William Negron would be fired if the Union lost the election and if the Union won the election they would be transferred to different jobs or pushed out of the Company one-by-one. Velez also testified that around August 11, "Tino" Hernandez told him the Company did not worry about losing the election because it would make changes and push the people out one-by-one. This latter statement was just about the same as that made by Larry Bonner to Mariano Rivera right after the election and similar to other Bonner statements. It is noted that Hernandez was then under Bonner and there was no denial that Bonner made such statements.

"Tino" Hernandez testified that he never started a conversation with any of his employees concerning the Union

and only answered questions. He stated that he had many conversations with Velez about work and Velez at one time asked him his opinion about the Union and that he replied it was no good. I do not credit Hernandez denials of the above testimony and find and conclude that by those statements Respondent violated Section 8(a)(1) of the Act.

C. The Warning Notices

Respondent, in its Answer and first amended Answer to the Complaint in Case 13-CA-14739, admitted that it commenced the use of warning notices around August 8, 1975, but stated that the warning system was merely an improvement over what it had done in the past. In its second amended Answer to this Complaint, Respondent for the first time denied that it had commenced use of the warning notices immediately after the election. Respondent thereafter, and in its brief, took the position that for years it had used written warning notices in enforcement of its rules and regulations but that verbal warnings had been heavily used and its discipline system had been inconsistent.

Respondent's counsel asserted that after the filing of the representation petition, it surveyed Respondent's disciplinary procedures and advised Respondent to use a consistent disciplinary system of a progressive nature beginning with verbal warnings and going to written warnings, suspensions and finally discharges for appropriate situations.

Company Vice President Bruce Kinander said he passed such instructions on to the supervisors and believed he did that about a month before the election. Mario Colosi who supervised most of the employees through other supervisors, was evasive in his answers as to when any such more consistent program was initiated, and said that it might have been before the election and may have been afterwards. As to when he had a meeting for the foremen to start this

uniform procedure, Colosi said that it might have been before and maybe after the election.

Supervisor Brilz was much more definite. He stated it was after the election that Colosi told all the supervisors that the Company and the Company's lawyers had said that there would have to be better bookkeeping in the disciplinary area and they would have to give out written warning notices whereas before they had been giving employees verbal warnings.

In seeking to demonstrate Respondent was merely enlarging the number of written warning notices given and that this was not a new or different disciplinary system, Respondent introduced its exhibits 9(a) through (n), which according to counsel were being offered as "—an illustration of prior use of a particular form here at issue for a variety of reasons." Asked whether the word illustration meant that the proffered exhibits were merely a sampling of the written warning forms in prior use, Counsel replied that from a search of Respondent's files that these were all the written warning slips that were on file as having been issued from 1972 up to the August 7 election. Of the 14 warning slips one was a duplicate of another reducing the number to 13. Nine of the 13 were issued to notify employees of safety violations with 4 of these 9 issued by Supervisor Garcia in a 1½-month period to one employee for stopping a machine with his foot. Three of the safety violation warning forms were issued by a supervisor no longer with the Company, Earl Shields, for employees not using safety glasses. One of the nine safety warning forms was issued by Bongiovanni to an employee in February 1975 for not wearing safety gloves and the remaining safety warning was issued in 1974 for nonuse of safety glasses.

Of the remaining four written warning slips, two were issued in 1973, by Larry Bonner. One was for "poor attitude" and the other gave an employee a day off for repeated

lateness. The third was issued by Mario Colosi in December, 1974 because an employee had not been careful and the last one was issued in February 1975 by Bongiovanni giving an employee 3 days off for not obeying his foreman. Most of the warning notices regarding safety were issued between March and May, 1974.

The issuance of written warning notices after the election commenced almost immediately and grew swiftly in volume. Beginning with a written warning notice to Martin Ibarra on August 11, 1975 and running through March 1976, Respondent issued 147 written warning notices.

One of the earlier written warnings was given by Foreman Ed Brilz on August 11, to Keith Uelsmann who testified that Brilz said he had to give him the ticket because he did not have his safety shoes on and the Company had to give these out now, because they had to protect themselves and watch themselves because there was a Union there now. Prior to giving Uelsmann the ticket Brilz mentioned to Uelsmann that he did not have his safety shoes on and Uelsmann replied that he had forgotten them and would go home at lunch time and get them. Brilz returned before noon and gave Uelsmann the written warning. Uelsmann testified without controdiction that there had been other times prior to the election when he had not worn safety shoes, the supervisors had known about it and had not said or done anything about it.

Uelsmann further testified that around October 1, while in the cafeteria with Larry Bonner and Mario Colosi, he heard Colosi tell Bonner that if they could get rid of the union people and get enough people in there that were for the Company, they would overthrow the Union. Bonner replied that you just could not go around firing the union people, you had to give them warning slips or the Union would get them their jobs back. Again this testimony was **undenied.**

There are a number of other instances where employees were given warning tickets and protested that they had never received anything like that before and the supervisor would remark that now that the Union was in it was necessary to give them these written warnings.

Ignacio Marrero said that after looking for his supervisor and not finding him, he left his partner in charge of his machine and went to Bruce Kinander's office to speak to him. Kinander not being there, he returned to his machine, being gone only a couple of minutes. When he got back his supervisor gave him a written warning ticket for having left his job unattended. Marrero complained that he had left the job before and never received a warning and the supervisor replied that this was the way it would be.

After receiving two warning notices Marrero, one of the three elected union committeemen (William Negron and Dick Rose), called Union Business Representative Haderly and said he was afraid the Company was setting him up to discharge him. Haderly called Bruce Kinander and a meeting was set for September 18. Haderly, Union Agent Menendez and Marrero met Kinander and raised questions about the warning notices and in particular those given to Marrero. According to Haderly and Menendez, Kinander told them that the warning notices were to be used only to straighten out the employees and when Haderly asked if they were to be used for any disciplinary or discharge purposes Kinander said no. At that point Haderly agreed that if all they would be used for was to straighten out employees he had no objections to them.

Kinander testified that he explained to Haderly that the warning notices were justified and it was merely a continuation of the warning system they had used before and that they were not singling out Marrero. He said that he told Haderly the warnings were given uniformly to employees

for safety infractions and where disobedience or tardiness occurred and they were not meant to harass people. Kinander said he explained that the Company had handled things in the past with verbal warnings and then gave written warnings after several verbal warnings and that in the instances involved they were either of a repetitive nature or of such a degree that necessitated a written warning notice. Kinander claimed that in effect he was telling Haderly Respondent had a progressive disciplinary system and that Haderly agreed that progressive discipline was the proper approach and that they should continue it. Kinander did admit he told Haderly the tickets were to call the attention to the employees to their deficiencies but denied telling Haderly that they were not to be used for disciplinary purposes.

In regard to what occurred at this meeting I have to credit Haderly and Menendez that Kinander said these warning slips were not to be used for disciplinary purposes. Haderly here was concerned because one of his three committeemen had received a number of warning notices. If Haderly had understood or Kinander had said that these warning notices were steps in a disciplinary system leading to discharge, Haderly would have been upset and inquiring as to the steps and what Respondent planned to do. Certainly Haderly would have protested these slips being issued to a union committeeman where the offenses, if any, seemed to be trivial and where the warning notices had not been given in this manner in the past. Thereafter when warning notices continued and suspensions and other discipline were imposed as a part of the issuance of the warning notices, the Union did not acquiesce in this use of the warning notices and protested such use by their statements to the Company and by filing charges concerning them wtih the Board.

There was no agreement between the Company and the Union on what the Company called its progressive disciplinary system. In fact during negotiation sessions when the term progressive discipline was mentioned, Haderly asked Company attorney Burlage for a definition. When Burlage replied that by that he meant a system of verbal then written warnings with suspensions and finally discharge with arbitrators decisions as the yardstick Haderly replied that was too ambiguous and that to actually install a progressive disciplinary system they would have to negotiate and come to an agreement on it. The only item in this line which was negotiated to a tentative agreement concerned employees calling in.

Respondent insisted that it had a rule which required emloyees to call by 9:00 in the morning if they were going to be absent. While such appears in the English language version of Respondent's rules, the Spanish-language version gives no time limit but merely says employees should call in. This is why there were protests by the Spanish-speaking employees concerning warnings to them about not calling by 9:00 A.M.

The Union and the Company did reach tentative agreement on employees calling in within 4 hours of their starting time and if they did not do so then for the first infraction they were warned with more serious discipline to be meted out for further infractions of this rule over a set period of time. As a part of the contract this agreement was tentative to ratification of the whole agreement. No announcement of this tentative agreement was made to the employees either by the Union or the Company or that such a rule was in effect. Apparently from the testimony of supervisors the Company instructed them to go by such a rule even though there was no final agreement.

There are examples which will be detailed further *infra,* where this written warning notice system was used by

supervisors in an apparent effort to build cases against known union sympathizers and where this occurred it violated Section 8(a)(3) of the Act as well. There are other incidents which were alleged as being violative of Section 8(a)(3) and (1) where a warning to an employee might have been warranted because of what the employee did. But that is not the question. The question presented in this case is whether Respondent by what it called its amplification of a rule and what General Counsel calls the implementation and enforcement of a brand new set of rules, violated Section 8(5), (3) and (1) of the Act.

It seems clear from the paucity of the written warning notices prior to the union election and the large number of written warning notices issued in the 6 or 7 months thereafter, that Respondent was not implementing an old disciplinary system but was structuring a brand new system which it put in, both to protect itself where it meted out discipline, and to harass some of the union supporters. While the latter may not have been intended by Kinander, this was certainly the message that came down through Colosi and Bonner as was amply illustrated by Colosi and Bonner's conversation about the use of warning notices cited above.

Certainly there were no negotiations with the Union concerning the advent of this written warning notice disciplinary system and Respondent does not claim that there was. Viewed as it must be from the facts, this was a new system that was initiated by Respondent effective when the Union won the election on August 8. Ceratinly the Union did not agree with the institution of this system as it continued to protest it both to the Company and by filing charges alleging it as violative of the Act.

Considering first the 8(a)(5) and (1) aspect of the allegations, it seems clear that under Board law the Respondent violated Section 8(a)(5) and (1) by unilaterally beginning

and imposing this discliplinary system at a time when the Union had just become the collective-bargaining agent of Respondent's employees. In *Murphy Diesel Company,* 184 NLRB 757, the Board found that the posting of plant rules with disciplinary penalties attached clearly affected conditions of employment and were mandatory subjects of collective bargaining. Although there had been some plant rules before, they had been loose and lax and this tightening up of the system amounted to a new system of rules. Although there the Company claimed that the Union had waived its rights in regard to the rules where there had been prior contracts, the Board found that there was no waiver and that Respondent made "material, substantial, and significant changes" in its rules and practices which affected all of its employees and that doing so without bargaining with the Union violated Sections 8(a)(5) and (1) of the Act.

The Board reiterated this rule in *Amoco Chemical Corp.,* 211 NLRB 618. *Amoco* is closer to the instant case because there Respondent began issuing written disciplinary letters to its employees immediately following the election where it had more or less abandoned such a system a year previously. The Company claimed it was merely resuming a prior irregularly enforced policy. The Board held that implementing such a system where it had been in disuse for a period of time and where only a few such notices had previously been issued, amounted to an innovation and constituted a significant change in the employees' working conditions and that beginning such a system without bargaining with the Union constituted a violation of Section 8(a)(5) and (1) of the Act. The Board's decision was upheld by the United States Court of Appeals for the 5th Circuit, 91 LRRM 2837, 529 F.2d 427.

Rust Craft Broadcasting of New York, New York, Inc., 225 NLRB No. 65 did not involve a "material, substantial, and a significant change" and is therefore inapposite.

On the basis of the evidence herein and on the basis of the Board's findings in similar circumstances, I conclude and find that Respondent violated Section 8(a)(5) and (1) of the Act by instituting and enforcing its disciplinary system on and after August 8, 1975, and I will recommend that such system be rescinded and all written warning notices issued thereunder and any discipline meted out pursuant thereto, be rescinded and any employees affected thereby be made whole by Respondent.

This finding has particular reference to employee Wilfredo Rosa. Rosa was given a series of warning notices regarding his productivity. After an economic layoff when he returned he was placed in a different department and told that he would be given a certain amount of time to pick up on the work. He was given less than that amount and received additional warning notices. The night supervisor, Detrick, said that he had fired a number of other people and that there had not been one the Union could bring back because he had fired them for a good reason. Very shortly after that Rosa was laid off.

After being discharged he returned to the plant to pick up his paycheck, saw Bongiovanni and Colosi and asked if they could do him a favor. He was seeking another job and wanted them to back up his statement that he had quit. Colosi asked since Rosa wanted a favor what sort of a favor could he return and mentioned that Rosa had a case in court (a charge before the NLRB) and if he took the case out of court he could do a favor for him because he was really fired. Rosa replied that he really was not fired properly because he had only been given 3½ days to work on the machine and it was a completely different machine. Colosi disputed that saying the only thing different was the way the coil came out of the drum. Again Rosa complained that he did not have time enough to learn to run the machine properly and had been improperly discharged. Colosi

replied that he knew how to run the machine. Colosi finally said that to show Rosa that he was not a bad guy if somebody called about Rosa he would tell them that Rosa was laid off and was a good worker.

Rosa had previously been a satisfactory worker as Bongiovanni told him. Here, he was given a short time to pick up on work after he had been laid off for more than a month and any supposed lack of production was not documented by Respondent's records. Here, Respondent relied on its previous warnings to Rosa to build a case against him and to lay him off as Night Supervisor Detrick had stated.

The treatment of Ignacio Marrero provides another example of the use of the warning notices. As noted above Marrero had received several warning notices by early September and felt that Respondent sought to get rid of him. This led to Haderly's meeting with Kinander about the notices. In late September, Marrero had the flu and did not report for work one morning. He was awakened by a telephone call from a fellow employee Mike Messina who said he had not called in and had later been told he was discharged for failure to call in. Marrero, as the union committeeman, called Supervisor Bily and started to talk to him about Messina and Bily said Messina was fired and since Marrero did not call in he was fired too. Marrero protested that he did not know of any 9:00 A.M. call-in rule, had the flu and had fallen asleep finally early in the morning and had not been able to get up and telephone the Company that he was going to be out.

Marrero then contacted Union Business Agent Haderly who called Bruce Kinander and discussed the situation with him. Kinander said he would check into it and called Haderly back and Haderly relayed the message to Marrero that since Messina had a good record they were only going to suspend him for one day but that since Marrero did not haves a good record he was receiving a 3-day suspension.

The "record" refers to the written warning notices the individuals had received.

General Counsel adduced evidence concerning a number of the written warnings contending that they all showed animus to the Union and as such violated Section 8(a)(3) of the Act as well. Certainly some of the examples did so demonstrate. Yet other examples were ambiguous or indicated that possibly the employees' actions were not proper.

I conclude that since I am ordering the entire system rescinded because its innovation and enforcement violated Section 8(a)(5) and (1) of the Act and since all employees who received notices will have them physically removed from their personnel files and will be made whole if they were suspended, laid off, or discharged as a result of the notices, that it would be an exercise in futility and merely further prolong a long decision to go through the circumstances of all these warning notices. The remedy here is sufficient to answer any remaining questions.

D. The Individual 8(a)(3) Allegations

1. Martin Ibarra started with Respondent in March 1974 and by October of that year had been promoted to a "setup man" and worked at that job in several departments, starting on the night shift and then moving to the day shift. As a "setup man" he did some of the paper work, writing down production reports and turning in such. In August 1975 he was working under Supervisor Luis Caban as a setup man. On the morning of the election he and several other employees and several union agents were outside Respondent's building distributing handbills to the people coming to work. According to the Union, the distributors arrived outside the plant around 6:30 A.M., and remained there until the employees had to go in to work. Ibarra testified that as he was distributing handbills Luis Caban passed by some 4 or 5 feet away but nothing was said between them. When

Ibarra went in to work that morning he gathered his handtools and was near the time clock waiting for Caban to tell him where to start work. Caban came up to him and told him to put away his tools because he would not be working any more as a setup man because he was for the Union, as Mario Colosi had told Caban. Ibarra was transferred to another department as a machine operator and was not permitted to continue as a setup man even though he had been one for 8 months and had been complimented by Colosi on being a good mechanic. While Ibarra suffered no immediate loss of pay as a direct result of that transfer the pay of setup men is usually higher than that of machine operators and if he had continued as a setup man his pay probably would have increased.

Immediately after transferring to the other department Jessie Garcia who was the setup man, came by and gave him a warning notice for not wearing safety gloves and said that Mario Colosi had seen Ibarra without the gloves and told him (Garcia) that Ibarra was for the Union. Ibarra protested the warning notice stating that they had not given him safety gloves to wear. The warning notice was not rescinded but he was given gloves shortly thereafter.

On the following day after the Union had won the election Luis Caban told him that by order of the Union all employees would now have to ask the foreman for permission if they wanted to go to the washroom or to the cafeteria. Three days later Ibarra was called to the office where Mario Colosi gave him a written warning notice which had written on it "second warning for this man" and told him that someone had told Colosi that Ibarra was not using the clutch on the machine. Ibarra denied it saying that he was using the clutch.

About 2 weeks later Garcia gave him another warning notice stating that he had a bad attitude and was making poor production and told him that Colosi had said Ibarra

was not making production. Ibarra had never been told about production prior to that time. About a week later Ibarra was given another warning notice stating his production was bad and giving him 3 days off. Garcia gave him the ticket saying that Colosi had sent it to him. Ibarra protested that the machines had been out of order the previous day and they had not taken into account the length of time they were not running. In late September, Ibarra was given another warning ticket which stated that he had been noticed talking to another employee on several occasions and doing nothing when he could have been working. A warning notice with the same message was given to Juan Martin. Garcia told Ibarra he was giving him the ticket because Colosi from his office had seen them talking too much. Ibarra said he had only asked Martin to watch his machine while he went to the washroom. Ibarra had never had any prior reprimands for talking and as far as we know there were no rules against talking in the plant.

In late November Ibarra was given a warning notice by Garcia who said Colosi had told him to give Ibarra the ticket because Colosi had seen Ibarra not wearing gloves when he put material on the machine. Ibarra explained it was almost impossible to thread the machine without taking the gloves off. He testified that Garcia had seen her without gloves doing the same thing on a number of occasions and nothing had been said. Ibarra continued to receive warning notices thereafter, most of them inspired by Colosi.

Respondent attempted to show that Ibarra was merely a learner and had never been a "setup man." During Ibarra's cross-examination there was testimony and written evidence that he had received a 25-cent raise in October 1974 with a notation that he was a setup man and again on February 1975 he received another 25-cent raise with the same notation. Even after he had been transferred for supposedly not doing his job he received another 25-cent raise on August 22. These were individual raises.

Caban stated he normally arrived at Respondent's plant between 7:00 and 7:30 A.M. and presumed he did so on the morning of the election. He said he saw no one outside the plant that morning. Ibarra had been working for him about 2 weeks and Caban said Ibarra was not a "setup man" and that he had become unhappy with Ibarra's work and had talked to Colosi about transferring him. Colosi said that Caban had complained about Ibarra's work a few days prior to the election and thought that Caban had done so a couple of times, the last time being when he transferred Ibarra on the morning of the election.

Caban contradicted himself on a number of occasions concerning Ibarra and others and generally showed his testimony was not credible. Caban denied that Ibarra told him he was going to the Labor Board, yet on an absence report for Ibarra signed by Caban, this reason is given for Ibarra's absence. Caban said he did not remember that Ibarra had ever been a setup man before the two weeks Ibarra worked for him. The pay change slips showed that Ibarra had been a setup man for some 8 months previously and indeed the payroll change notice for Ibarra dated 10/14/74 was signed by Caban and showed Ibarra was the "setup man" and under remarks said that he was excellent in that position. This graphically demonstrates Caban's unreliability. Caban testified that he gave out written warning notices in 1974, but as Respondent's exhibit 9 show, none of the 13 written warning notices for the years 1972 through August 1975 had Caban's signature.

Caban was evasive in his testimony but finally did admit that he talked to Colosi about transferring Ibarra on August 7. Indeed when shown the payroll change slip with Martin Ibarra's name on it Caban said it was true if that was the same man. Counsel for Respondent said there was no question that it was.

In the face of this testimony there is no question but that Ibarra was a setup man and was transferred from that position to a machine operator because he had been seen at least by Caban and probably also by Colosi distributing union handbills on the morning of the election. The transfer was an attempt to downgrade Ibarra and to inhibit his future with Respondent. I conclude and find that this action was violative of Section 8(a)1) and (3) of the Act and will recommend that Ibarra be returned to the status of "setup man" and be made whole for any loss he suffered due to Respondent's discrimination against him.

2. Adrian Velez began with Respondent in February 1975 and in May was promoted to "setup man" from machine operator by Colosi, who told him at the time, that he was a good worker and had a good future with the Company. While at work, Velez broke his finger on June 12 and was transferred to the night shift on June 16 by Colosi, saying that he could work nights helping the "setup men" and help train new employees, and that when his finger healed he would be transferred back to the day shift.

On July 16 Supervisor Bonner told Velez that someone had said he had signed a union card and asked if it was true. Velez admitted it. Later that same day Colosi asked Velez whether it was true that he had signed a union card and again Velez admitted it. Colosi said he could not believe it because Velez had had a good future with Respondent. Later that same day Velez was called into Colosi's office where Colosi in Bonner's presence told him that he could no longer be a "setup man" and that they were transferring him to the extruding department where he would be a packer on the day shift. In its records Respondent referred to Velez as a "setup man" although Bonner and Colosi said that he was a trainee.

Concerning the transfers Colosi said he transferred Velez to the night shift because he could not work whatsoever with his finger and at the time of that transfer (June 16) he had no knowledge of Velez' union sentiment. Colosi did not deny knowing Velez' sentiments at the time of the July 16 transfer. The transfer on July 16 was purportedly for the reason that Velez could do light work and had not been doing his assigned work on the night shift. Respondent also claimed that Velez had been released by the doctor and that the finger had healed properly and he should be doing some work. However, Respondent neglects that Velez reinjured his finger, and conveniently neglects that Colosi had authorized a 25-cents per hour raise for Velez on July 26.

A better insight into this July 16 transfer was offered by the testimony of Keith Uelsmann, that prior to the election while in the toolroom he heard Bonner tell Bily to try to get rid of Adrian Velez, that Velez' finger had not healed right and he had not had proper medical attention. Bily replied that there was no reason to get rid of him because Velez was a good worker. Bongiovanni spoke up and said put him in my department and I will get rid of him. Colosi said that he would get rid of him, and that he wanted to be rid of him before the Union came in, that afterwards they would never get rid of him. There is no specific denial of this testimony by any of the supervisors involved.

Bily attempted to get Velez to package the reels. Bily testified that he felt Velez could do the job with one hand and said he showed him it could be done. How a person could put a metal band around a coil and secure it with one hand strains the imagination. Further somewhat in contradiction to this Bily stated that packing cartons which involves the reels requires two hands.

On the basis of all the testimony I conclude and find that the transfer of Velez on July 16 was for the purpose of

punishing and discouraging Velez for his union sentiments and an attempt to get rid of him prior to the union election. I conclude and find that this July 16 transfer of Velez was violative of Section 8(a)(1) and (3) of the Act and will recommend appropriate remedial action.

3. In January Respondent arranged a meeting with the Union at the office of a federal mediator and stated that the economic situation was such as to necessitate the layoff of some employees. A layoff list of some 30 employees was presented by the Company to the Union at the company office shortly theerafter and it was based according to the Company on the seniority dates of the employees with those with the lowest seniority being laid off. Since two employees had in the interim resigned, the Union and the Company agreed to trim the layoff list to 28. Included in the list with a seniority date of April 4, 1975, was Ignacio Marrero, one of the three union committeemen in the plant. When Marrero saw this date, he protested that his seniority date should be October 29, 1974, and produced a letter of recommendation from the Company establishing that as his seniority date. Marrero had worked for Respondent from latter October through the first part of December 1974. Respondent got Marrero's personnel file and on checking its contents the Company and the Union agreed that the correct date for Marrero's seniority should be October 29, 1974. Marrero was then excluded from the layoff list and because of this error the Company got the personnel folders of the other employees on the layoff list so that they could be checked. Some eight changes were made as a result of this procedure. Respondent said that it would prepare a revised laffof list from the seniority dates and wished to review all the personnel files and prepare an updated correct seniority list. About 5 days later the reviewed layoff list was presented to the Union. Marrero was not on the layoff list and continued to work.

About a week later Respondent advised the Union that they had discovered other mistakes in the seniority dates and arranged a meeting for February 5. At this meeting Colosi informed the Union that the corrections they were making for the revised layoff list were based on what was "agreed to at the bargaining table," which meant to the Company that it was granting a seniority date only where the employee had completed a 60-day probationary period. Respondent had never had a 60-day probationary period but in the negotiations between the Union and the Company there was tentative agreement on a 60-day probationary period, but no agreement that items tentatively agreed to were to immediately go into effect or to be retroactive. The Company announced that it was revising the seniority list and dropping Marrero's seniority date to April 1975, because he had not completed a probationary period the previous year which resulted in laying him off and recalling the most senior person on the layoff list. Respondent also announced that employees on the layoff list who had never completed a 60-day probationary period would not be recalled. These actions were taken over the Union's protest and when the Union said it would file charges the Company told it to do so.

Bruce Kinander was asked about the 60-day probationary period and whether it was mentioned in any of the meetings concerning layoff. Kinander was uncertain and finally said that it was mentioned. He then did not recall whether Attorney Burlage or himself had said it but stated that it had been discussed during the prior negotiations. Pressed further, Kinander said that he did not mention it and was not sure whether it was brought up by the Union or the Company. He retreated further and stated that he did not remember whether it was brought up at the time the list was given to the Union or not. Finally he said that nothing about it was brought up when the Union was first given the layoff list nor during the second meeting.

Colosi testified that they had revised the seniority list and after revising it again brought it to Attorney Burlage and it was only after consultation with Burlage that they went through the probationary period idea. During further examination Colosi was extremely vague as to when, if at any time during the meeting concerning layoff, that the 60-day probationary period was mentioned. He attempted to indicate that it was, by saying that they were going according to the contract. But when pressed as to whether those words were used in any of those meetings he agreed they were not. Colosi's disingenuousness was further demonstrated by his statement that he took the word of the Union that the probationary time had been served. The Union had never mentioned probationary period and had no thought whatsoever of introducing probationary period retroactively. Colosi further stated that the people whom he determined had not served a 60-day probationary period were never recalled and these individuals were never informed why they were not recalled to Respondent but that only the union was informed of the reason for the nonrecalls. Separation notices were made out for these six individuals about 1 month later, but it is not known whether they ever received them.

Respondent's dredging up the use of a probationary period and using it retroactively in this context to lay off one of the Union's committeemen is in keeping with Respondent's use of the contract proposals where it felt it was to its best advantage to do so and disregarding those sections which it did not want to put into effect. I would agree that Respondent sought to avoid complications wtih the Union by laying employees off in accordnace with seniority but its determination to get to Marrero and lay him off demonstrates its desire to disrupt the Union and rid itself of as many agressive union employees as it could. Certainly where Respondent and the Union had agreed on the system of layoff as they had done at the two meetings and there

was no disagreement and no mention of a retroactive probationary period, it is a breach of that agreement and a demonstration of bad faith, to announce a "mistake" and revamp the whole procedure by bringing in an unconsidered item. That this was contrary to the understanding of both the Union and Respondent at the earlier meetings is shown by the Union's reaction to this unilateral restructuring of the layoff. Rights which the employees had at the time of layoff by the use of the agreed-to seniority layoff were abrogated unilaterally by Respondent's actions.

I conclude and find that Respondent's use of the tentatively agreed to probationary period in this instance, was a subterfuge to allow it to lay off Ignacio Marrero and I conclude and find that Respondent thereby violated Section 8(a)(1) and (3) of the Act.

Additionally as Respondent admitted that it laid off others and did not call them back because they had not served the "probationary period" and since this is undenied and was brought out in full during this hearing, I find that the use which Respondent made of the "probationary period" also violated the Section 7 rights of these other six employees, and that Respondent's refusal to recall them violated Section 8(a)(1) of the Act. The six who were not recalled are: Teodoro Feliciano, Gilberto Espinosa, Juan Santiago, Luciano N. Lopez, Daniel V. Perez and Sebastian Gomes.

I will recommend that Respondent restore Marrero to the position which he would have held had he not been laid off by Respondent and further that Respondent offer reinstatement to the above-named six employees whom it refused to recall, making them whole for any losses that they have suffered.

4. Tony Capasso was a toolroom machinist who worked for Foreman Brilz from February 1975 to his discharge.

Capasso had been questioned by Brilz about his knowledge of the Union in July and whether Carlson and Rose were for the Union. Near the end of July, Brilz told Capasso that he had a book of rules and regulations and would make things rough on union supporters. Around the time of the election Brilz told Capasso that the Company would take care of those who voted for the Company by putting them in management where they would not be hurt.

On Tuesday or Wednesday, October 21 or 22, Capasso said that Brilz was in a bad mood and asked Brilz what was wrong. Brilz replied it was because people from the Labor Board had come out and he knew that Capasso had something to do with the complaint. Capasso told Brilz he was only doing what he thought was right, and Brilz replied that he could have Capasso's job in a week if he wanted it.

On Monday, October 27, Brilz talked to Capasso and Rose about not wearing their safety shoes. Capasso said he had left them home and Rose said that his were locked in the trunk of his car and he did not have the key. Capasso asked Brilz if he wanted him to go home and get them and Brilz said no, but came back several hours later and gave both Rose and Capasso warning notices including a 3-day suspension for Capasso and one day off for Rose. Rose testified that at lunch time he removed the back seat of his car and was able to get into the trunk and get his safety shoes and as he came back in the plant Brilz and Capasso were standing outside the toolroom door talking in loud voices but he did not hear what they were saying.

Around noon Capasso saw Brilz and complained they were not treating anybody right handing out those yellow tickets and he was getting a 3 days' suspension while Rose was only getting 1 day off. Capasso testified he told Brilz that some day someone was going to take one of those yellow warning tickets and shove it down Brilz' throat.

Brilz said he would like to see it happen and Capasso replied that one day it would happen. Brilz asked if Capasso was going to do anything about it and Capasso said that sooner or later somebody was going to take Brilz out in the parking lot. He testified that Brilz asked why Capasso was not doing anything about it and he replied that he would not do anything on company property but if Brilz wanted to go off company property it would be different.

Capasso left the plant, and the next day October 28, came back to pick up one of his toolboxes. He testified that Brilz asked if he could look inside the toolbox and he said sure, but that Brilz did not do so. On the morning of October 29 he called the plant to find out when he should return to work and Colosi told him not to do so because he had been fired. When Capasso asked why, Colosi said for not letting Brilz look in his toolbox. He told Colosi that he asked Brilz if he wanted to look in the box and Brilz said it was all right.

Capasso went to the plant and met with Brilz, Bonner and Colosi and Union Committeeman Dick Rose and asked why he was being discharged. Colosi said he was discharged because he would not let Foreman Brilz look in his toolbox. Capasso said he had asked Brilz if he wanted to look in it and Brilz said it was all right. Brilz said that a box of drill bits were out and he thought Capasso had taken it. Capasso told Brilz he had given the box of drill bits to another employee and named him. Colosi asked if that was true and Capasso offered to prove it and he and Brilz went into the plant and the other employee confirmed that Capasso had given him the box of drill bits. They returned to Colosi's office and Brilz said that the other employee had the box of drill bits. Capasso then asked Colosi if he could be reinstated. Colosi said no, he was being discharged for threatening Brilz. Capasso protested that he had made no threat to Brilz. Colosi said he would believe his foreman before he

would believe Capasso and was sick and tired of the employees making complaints and the Company was going to run it the way they thought, union or no union, and if they did not like it to have the Union take it to court. After some further words Capasso was given a discharge slip stating that he was discharged for threatening bodily injury to Brilz and that such threats had been witnessed by Dick Rose.

As noted above Rose said that he never heard any threats. In the meeting Brilz stated that Rose had witnessed it and Rose replied to Brilz that he had heard Brilz and Capasso talking in loud voices, but did not hear what they were saying to one another.

Brilz testified that Capasso had his safety shoes there but refused to put them on and that Capasso and Rose were being insubordinate in refusing to wear them. I do not credit Brilz' testimony that Capasso had his safety shoes there and at the plant in Brilz' view. If Capasso had, he certainly would have put them on at that time as Brilz allowed Rose to do. Brilz also stated Capasso refused to let him look in the toolbox the first time and that Brilz specifically threatened him with meeting him in the parking lot after work.

Colosi testified that Brilz told him Capasso had threatened to fight with him in the parking lot and he and Bonner went with Brilz to the parking lot to see if Capasso would attempt to carry out his threat but Capasso was nowhere around. He said that the following day Capasso called and said he would like to have a leave-of-absence because things were a little hot down there and he told Capasso he was discharging him for threatening his foreman. Colosi said that Capasso came to the plant a few minutes later and in a meeting he told Capasso he was discharged for threatening Brilz. Colosi did recall something about a toolbox but

said that Capasso refused to let Brilz look in his toolbox, but denied that he said anything to Capasso about it.

In this situation I credit the testimony of Capasso that he walked the thin line about not specifically threatening to do bodily harm to Brilz. Brilz may have taken it as a direct threat but I do not believe from the context that Capasso indicated that he was going to carry out the threat. Weighing on this credibility question is the undenied 8(a)(1) statements of Brilz to Capasso including the prior interrogations and most specifically the event of the previous week where Brilz told Capasso he was angry because the Labor Board had come out there and he knew Capasso had something to do with it, and threatened that he could have his job within a week. The heavier suspension given to Capasso over Rose with no explanation for the disparity lends credence to Brilz' threat.

The discharge events did not occur as Colosi testified, there being 2 days between the "threat" and the discharge and with Capasso coming to the plant on the intervening day to pick up a toolbox and talking to Brilz and nothing being done on that occasion. If Colosi had considered the "threat" serious, he would have done something about it when it occurred and not 2 days later. Brilz and Rose corroborated that Capasso was accused of taking company drill bits and that Capasso proved that did not occur. It is only after this reason for discharge was punctured that Respondent fell back to the "threat." Even there, both Brilz and Capasso said there was no animosity between them, and Brilz never recommended any disciplinary action for this "threat."

On the basis of this resolution of the facts, I conclude and find that Respondent violated Section 8(a)(3) and (1) of the Act by its discharge of Tony Capasso.

Further based on this resolution of the facts, I find that Respondent violated Section 8(a)(4) and (1) of the Act by the discharge of Tony Capasso.

5. Juan Martin was one of Respondent's senior employees having been employed since February 1971. Martin signed an authorization card and attended union meetings and on one occasion Colosi accused Martin and others of talking about the union. When they denied it he said that the Puerto Ricans and Mexicans were stupid because so many of them wanted a union. Colosi then gave them a "Rockefeller gesture" saying what he meant and that was what should be done to the union.

Colosi testified that he assumed the production floor employees were for the union and this would have included Martin. Martin also helped distribute union handbills on the day of the election and would have been seen by a number of Respondent's supervisors. Caban's denial of seeing anyone outside that morning is specifically disbelieved and Caban was Martin's supervisor.

On January 28, employee Auricilio Feliciano, a maintenance man, received Martin's help in emptying a barrel of scrap near his machine. Later Feliciano returned and again sought Martin's help in emptying a trash barrel. Martin refused, saying that he was too busy and for Feliciano to go to his foreman and get somebedy else to help him. Feliciano's foreman, Stawinski, was incensed that Martin refused to help and reported it to Plant Superintendent Colosi who called Feliciano, Martin, Stawinski, Caban and the union committee into his office. Colosi took the position that since the barrels were too heavy for one man to lift, it was the duty of the employees to help the maintenance men lift the barrels and Martin was instructed to help Feliciano when he sought help. Everyone was then sent back to work.

Martin and Feliciano were walking in an aisle which at one point was partially blocked by a lifttruck and trash gondola and there was only room for one to pass. As they went through that area Feliciano and Martin, as they later testified, bumped shoulders and continued on their way back to work. Stawinski who was behind them saw it differently and testified first that Martin was behind Feliciano and pushed Feliciano with both hands into the lifttruck, knocking him off balance. Stawinski said he was about 5 feet away at the time and that he immediately called Martin's supervisor, Luis Caban and told him that Martin had deliberately pushed Feliciano into the lifttruck and that Feliciano could have been injured. To an inquiry Stawinski said that Feliciano spoke half in English and half in Spanish and told him that Martin had pushed him in a fit of anger. Stawinski said he then went to see Colosi and told Colosi that Martin was full of anger and had pushed Feliciano between the lifttruck and the trash gondola. When they went into the office, according to Stawinski, Colosi spoke to them and discharged Martin for what he had done.

Stawinski testified on cross examination that after the pushing incident both Martin and Feliciano were back at their duties when they were told to go back to Colosi's office. Stawinski specifically said that there was no fighting, only one man shoved another, and that was the reason for the discharge which he insisted Colosi imposed in this second meeting. Stawinski insisted that Martin did not go back to work after the second meeting.

Stawinski said that Feliciano stated Martin had pushed him. Later Stawinski said that after Feliciano got pushed, he immediately spoke to Feliciano and then went and got Caban but that Martin had already left and gone to his machine. Asked if he waited until Martin left before he talked to Feliciano and Caban, Stawinski stated he talked

to Caban right as it happened because Caban was standing just a few feet away. During further examination Stawinski reversed the order of March and stated that Martin was first followed by Feliciano and that when they got by the lifttruck and trash gondola Martin turned around 180 degrees, pushed Feliciano with both hands shoving him into the lefttruck and turned around again and walked on to his machine some 40 feet away.

According to Martin, when they got to the office the second time Colosi asked why they had fought and both he and Feliciano replied that there had been no fight.

Union Committeeman Marrero was called to the office both times. On the second occasion he talked in Spanish to both Feliciano and Martin who told him that the place was a bit close and that Martin had pushed or bumped Feliciano a bit but that there had been no fight. Marrero then told Colosi what they had said and Colosi said if what Marrero said was true and nobody fought he was going to let it go, but he did not want to see it happen again, did not want anybody fighting. Both Feliciano and Martin were told to go back to work and both did. Marrero stated that about an hour later Colosi came by and said that he trusted him and was going to forget about it but that he did not want anything like that to happen again.

Luis Caban testified that Stawinski told him Martin had pushed Feliciano in anger, hard enough to push him inside the gondola, and that Feliciano had said the same thing. Feliciano testified that there was no grudge between him and Martin and when he was asked if there had been a fight he told Colosi there had not been, and they were told to go back to work.

Caban said that he told Martin at that time that he was suspended until Colosi decided what was going to be done, but that Martin was going to be fired for pushing Feliciano.

Caban insisted on cross examination that Martin was discharged at that second meeting and Colosi said Martin was suspended and would be fired the next morning, but both of them were sent back to work.

Colosi said that Stawinski was very mad when he came to the office and said that his man had been pushed or shoved and that Stawinski later cooled down and told him that Martin had pushed Feliciano by the lifttruck hard enough to hurt him. Colosi stated that in this second meeting Feliciano said that he was pushed and through Caban, acting as an interpreter, asked if Juan Martin hit Feliciano and Martin said yes. Colosi said he decided to discharge Martin and told the union committee present that he would let them know that night, to reaffirm the decision he had made, and then sent Feliciano and Martin back to work. Colosi said that Marrero came in an hour later and told him that Martin and Feliciano were friends and had not been fighting. He said he told Marrero that they did fight and he was not going to retreat on what he had said. He testified he confirmed his decision with West and Bruce Kinander that evening and told Marrero that same day that he would discharge Martin the next morning.

Marrero disagreed and said he was surprised the next morning when he was called into the office and Colosi said he was going to discharge Martin. He asked Colosi why, since there had been no fight and Colosi replied that he was discharging Martin because he had a boss (Bruce Kinander) too, that he had talked it over with Kinander and they decided to discharge Martin. Marrero stated that Colosi said he was sorry about it because Martin was a good worker but there was nothing he could do about it. When Marrero said that this was another charge for the Labor Board, Colosi told him he could do anything he wanted to.

From the recitation of the witnesses and what the facts appear to be, there was no fight but rather an insignificant

bumping. Stawinski's version of what happened was contradicted by Stawinski a number of times. Colosi's use of the word "fight" in this situation shows a propensity to exaggerate a minor incident into a major one so that a union supporter could be let go. Certainly if the incident had been serious enough to warrant discharge it would have been accomplished then and Martin and Feliciano would not have been sent back to work where they were in close proximity to one another. Common sense dictates that Respondent's reasons, statements and testimony here are erroneous and that Respondent was seeking again to get rid of prounion adherents one by one and took this opportunity to magnify a minor incident into a major confrontation as a reason to discharge an individual.

I conclude and find that Respondent violated Section 8(a)(1) and (3) of the Act by its discharge of Juan Martin.

7. Hermenejildo Mendoza started with Respondent in June 1974 and was a lifttruck driver. Part of his duties included moving raw materials to various departments, moving machinery, cleaning and weighing raw and slitted steel. Mendoza would deposit a skid with steel on the scale, note the weight, put it on a tag and place that tag on the steel. Apparently there was a device on the scale which would automatically compensate for the weight of the skids, but there were two different skid weights, one for the skids used for raw steel and one for the skids used for slitted steel. It was therefore necessary for Mendoza to be sure how the scale was set.

Mendoza testified that in early December 1975, and on numerous other occasions he complained about the scale being out of balance and had been told when it was, not to weigh anything at that point, but to waith until the scale had been repaired. About mid-December Mendoza stated he told Enrique Garcia that after he had weighed a number of skids, he noticed that the scale device which deducted

skid weight had been altered and that he would have to reweigh some of those skids. He said that Garcia merely shrugged his shoulders and said nothing and since it was close to Mendoza's quitting time, he did not reweigh any of those skids and did not have time to do so over the next 2 weeks. In latter December when a year-end inventory was being run, Respondent's outside accountants had a number of skids weighed and noticed that the skid weight had not been deducted to get a net weight for the steel. Respondent's supervisors were then told that to get a true picture for the year-end inventory and financial documents it would be necessary to reweigh all of the steel to be sure just what Respondent had. According to Respondent, it took about a day and a half to reweigh all the skids of steel. Mendoza was given a 3-day suspension for not properly weighing the steel, although he had originally been threatened with discharge.

When Mendoza was asked about the errors, he told Kinander and Colosi that the scale had been off any number of times. This, however, did not answer the question about deducting the skid weight. It should be apparent that if the skid weight had not been deducted by Mendoza by an adjustment on the scale, that knowing the skid weight that adjustment could have been made by deducting the weight of the skid from the steel when it was done. But nothing was done and the incorrect weights were left on the tags on the steel. Mendoza on December 30, when he was being reprimanded and given the 3-day suspension apparently did not tell anybody that the scale appliance for deducting the skid weight had not been set properly, but merely blamed it on the inaccuracy of the scale which was no answer to the problem.

Even though Mendoza's prounion sentiments were known to the Company I do not think that this enters into this suspension. It appears that Mendoza made a mistake and

did not correct it, although he had some 2 weeks within which to do so and when caught on it did not answer the questions truthfully but sought to cover them up by saying that the scale was inaccurate.

In this situation I find that Mendoza was not suspended because of his support of the Union and, accordingly, dismiss this 8(a)(3) allegation.

E. Other 8(a)(1) Allegations

1. Several days prior to the election, Colosi took the employees' timecards and met with a group of supervisor in the toolroom. They went through the timecards and made up a list of who they though was for the Union and who was against the Union. A number of employees including Uelsmann and others observed them making up this list. Colosi said he was guided by what he thought the sentiments of the employees were and eventually they came to the conclusion that the Company would probably win the election.

The complaint alleges that this activity within the sight of the employees created the impression of surveillance of the employees' union activity and that Respondent was maintaining a list of those that were for and against the Union in violation of Section 8(a)(1) of the Act.

It is clear that employees did see Respondent's supervisors engaging in these activities and would get the impression that Respondent did have some knowledge of what their union activities or sentiments were and was making lists of them. I conclude and find that this action did violate Section 8(a)(1) of the Act.

2. The complaint was amended to allege that the Company bypassed the Union and solicited grievances from employees in violation of Section 8(a)(1) of the Act.

The story of what was done concerns Dick Rose and I conclude and find that what Respondent did, did not violate the Act. Dick Rose and Supervisor Brilz were not getting along and on one occasion Rose felt that Brilz was having another employee improperly mark company tools with Brilz's name. This led to a confrontation where Brilz was angry and made remarks to Rose. There were also a number of warning tickets given out and Rose complained vociferously about them.

Rose was one of the three union committeemen and, at one of the negotiation meetings after the tool matter, Bruce Kinander asked Rose to stay after the negotiation meeting and asked if Rose would meet with Colosi and Brilz in an effort to work out their differences and suggested that they meet each morning for 15 minutes to handle their problems. They did start meeting and handled a number of problems such as the parking lot and when the allotment of overtime was discussed and either Colosi or Brilz said that Rose was the only one complaining, Rose got the other people in the toolroom and they all went and talked to Colosi and Brilz about overtime and other things they were complaining about. Rose said that they talked on one occasion for some 20 to 30 minutes about not receiving work, or having tools to work with. These sessions gradually diminished and stopped altogether.

Since Rose was a union committeeman I would consider these discussions as more or less first step grievances in that the union committeeman was there ironing out with supervisors problems that he and the employees had with supervisors and with their working conditions. I therefore would dismiss this allegation of the complaint. However, there is another allegation entwined with it, that Rose had been told by Bruce Kinander that if he refrained from filing additional charges, that Kinander would remove all warning notices from Rose's personnel file. This testimony

is undenied and I credit Rose and find that by such statement Respondent by Bruce Kinander violated Section 8(a)(1) of the Act.

3. On another occasion Rose's wife was in the hospital and Respondent sought her room number in an effort to send flowers. Rose felt that the inquiry was to check up on him and became incensed and talked to Brilz about it. This became known to Kinander and he called Rose in and explained to him that Company policy provided that Respondent would send flowers to employees or their spouses when they were in the hospital. Rose stated that he was being harassed and Kinander became angry. Rose said something about filing charges and Kinander asked whether he intended to do so and told him to do what he wanted but he was making him extremely angry. This allegation of 8(a)(1) is, I think, a bit of overstatement and really was a result of touchiness on behalf of the two people involved. I feel that Rose was overly sensitive about being questioned and that Kinander, being threatened with charges for something he felt the Company was doing in a humane way, lost his temper and made a statement that was unnecessary and probably not intended. I will not find that this incident violated Section 8(a)(1) of the Act.

III. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section II, and therein found to constitute unfair labor practices in violation of Sections 8(a)(1), (3), (4) and (5) of the Act, occurring in connection with Respondent's business operations as set forth above in section I, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. The Remedy

Having found that Respondent engaged in the unfair labor practices set forth above, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of this Act as follows:

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally promulgating and implementing a warning and disciplinary system, it is recommended that such rules and the procedure to enforce them be rescinded and withdrawn and that the *status quo* as of August 7, 1975, be restored by Respondent removing from its personnel or other files and destroying all warning notices issued since August 7, 1975, and by rescinding all disciplinary action taken pursuant to its unilaterally imposed warning and discipline procedure and making whole all employees suspended or laid off thereunder by reinstatement and the payment to them of those sums which they would have earned as wages for such periods, less any net earnings, as prescribed by the Board in *F. W. Woolworth Company* 90 NLRB 289, with interest as set forth in *Isis Plumbing & Heating Co.* 138 NLRB 716.

Having found that Respondent violated Section 8(a)(3) and (1) of the Act by its transfer, discharge, layoff or suspension of Adrian Velez, Martin Ibarra, Juan Martin, Ignacio Marrero and Tony Capasso and additionally violate Section 8(a)(4) of the Act regarding Capasso, it is recommended that Respondent offer them full and immediate reinstatement to their former positions and make them whole for any loss of pay they may have suffered by reason of Respondent's discriminatory treatment of them by payment to them of a sum equal to what they would have normally received as wages from the dates of their transfers, discharges, layoffs or suspensions until they are fully reinstated by Respondent, less any interim net earnings. Backpay is to be computed as set forth above. I further

recommend that Respondent make available to the Board, on request, payroll and other records to facilitate checking the amounts of backpay due them and any other rights they might be entitled to receive.

Further having found that Respondent violated Section 8(a)(1) of the Act by the numerous acts and conduct detailed above and since it is part of the purpose of the Act to prevent the commission of unfair labor practices, I recommend that Respondent be ordered to cease and desist from violating the Act in the above or in any other manner.

Having found that Respondent discriminatorily laid off Ignacio Marrero by manipulating the layoff list and that it also laid off and did not recall Teodoro Feliciano, Gilberto Espinosa, Juan Santiago, Luciano N. Lopez, Daniel V. Perez and Sebastian Gomes, I recommend that Respondent reinstate them to their former positions and make them whole for any loss of wages they may have suffered in the same manner as set forth above.

On the basis of the foregoing findings and the entire record, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by unlawfully: A. Interrogating employees about their own union sentiments and activities and those of other employees. B. Threatening employees with the loss of benefits or employment or with other reprisals if they supported the Union. C. Promising employees benefits for withdrawing support from the Union. D. Threatening employees with reprisals for taking matters to the Board and promising benefits for withdrawing charges from the Board. E. Creating an impression of surveilling the union activities of employees and maintaining lists of pro and anti-union employees.

4. Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily transferring, laying off, discharging or suspending Adrian Velez, Martin Ibarra, Juan Martin, Ignacio Marrero and Tony Capasso and violated Section 8(a)(4) of the Act by its termination of Tony Capasso.

5. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally initiating and imposing a warning and disciplinary system at a time when the Union had become the employees' collective bargaining agent.

RECOMMENDED ORDER[3]

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record in this case considered as a whole, it is recommended that Electri-Flex Company of Roselle, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in violation of Sections 8(a)(5) and (1) of the Act with District No. 122 IAM & AW, AFL-CIO, as the exclusive representative of its employees by unilaterally initiating and imposing a warning and disciplinary procedure.

(b) Transferring, discharging, laying off or suspending employees because of their known or suspected union senti-

[3] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ments and activities or in furtherance of the unilaterally imposed warning and disciplinary procedure.

(c) Terminating employees because of their giving information to the Labor Board.

(d) Interrogating employees about their own union sentiments and activities and those of other employees.

(e) Threatening employees with the loss of benefits or employment or with other reprisals if they supported the Union.

(f) Promising employees benefits for withdrawing support from the Union.

(g) Threatening employees with reprisals for taking matters to the Board and promising benefits for withdrawing charges from the Board.

(h) Creating an impression of surveilling the union activities of employees and maintaining lists of pro and anti-union employees.

In the same or any other manner violating the Section 2 rights of employees.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Offer reinstatement to and make whole all employees transferred, discharged, laid off or suspended under the operation of the unilaterally imposed warning and disciplinary procedure including Adrian Velez, Martin Ibarra, Tony Capasso, Juan Martin and Ignacio Marrero and those laid off under the unilaterally revised and discriminatorily imposed layoff list including Ignacio Marrero, Teodoro Feliciano, Gilbert Espinosa, Juan Santiago, Luciano N. Lopez, Daniel V. Perez and Sebastian Gomes and make them whole in accordance with the recommendations set forth in "The Remedy" in this decision.

(b) Remove from the personnel or other files of employees all disciplinary warning letters or memoranda issued since August 7, 1975.

(c) Post at its plant in Roselle, Illinois, copies of the notice attached hereto in both English and Spanish and marked "Appendix."[4] Copies of said notice in both English and Spanish, on forms furnished by the Regional Director for Region 13, shall after being duly signed by an authorized representative of Respondent, be posted by Respondent imemdiately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER recommended that the 8(a)(1) allegation concerning Feliciano and Luis Caban and the allegation concerning bypassing the Union and soliciting grievance and the 8(a)(3) and (1) allegation concerning Hermenejildo Mendoza be dismissed.

Dated, at Washington, D.C. October 28, 1976.

/s/ JOHN M. DYER
John M. Dyer
Administrative Law Judge

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[4] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

ELECTRI-FLEX COMPANY
and
DISTRICT NO. 122, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO

Cases 13—CA—14739 and
13—CA—15036
228 NLRB No. 79

DECISION AND ORDER

On October 28, 1976, Administrative Law Judge John M. Dyer issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a brief in support thereof, and an answering brief to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge to the extent consistent herewith.

1. We find no merit in the Respondent's exception to the Administrative Law Judge's statement that a major portion of the 8(a)(1) allegations is not specifically denied. The statement accurately reflects the fact that the 8(a)(1) allegations attributed to Supervisors Bonner and Bongiovanni were undenied as the supervisors were not called to testify. We note that together Bonner and Bongiovanni were responsible for a significant and varied amount of 8(a)(1) conduct. Respondent also excepted to the findings with respect to a number of 8(a)(1) statements made by Supervisors Garcia, Caban, Colosi, and Brilz on the grounds that the Administrative Law Judge based his findings solely on the absence of specific denials by these supervisors to the respective allegations. We do not agree. Viewing the Decision as a whole, it discloses that the Administrative Law Judge's findings on the excepted 8(a)(1) allegations were not based solely on the presence or absence of specific denials by Respondent's witnesses. The Decision initially credits the General Counsel's witnesses who testified to the 8(a)(1) allegations. There was, to be sure, certain testimony by Respondent's witnesses which conflicted with that of the General Counsel's witnesses. However, although the Administrative Law Judge did not make explicit credibility findings with respect to this conflicting testimony, it is clear from reading the Decision that the Administrative Law Judge implicitly resolved this conflict by accepting and relying on the testimony of the General Counsel's witnesses. Finally, we note that the Administra-

[1] We hereby correct the following inadvertent findings in the Administrative Law Judge's Decision which in no way affect his Decision nor our adoption thereof: In the last sentence of par. 25 of sec. II,C, the words "laid off" should be replaced by the word "discharged"; in the next-to-last

(Footnote continued on next page)

(Footnote continued from preceding page)

sentence of par. 6 of sec. II,D,1 the dates "May 22 effective June 2, 1975," should be substituted for the date "August 22"; in the last sentence of par. 3 of sec. II,D,2 the month "June" should be substituted for the month "July"; in par. 3 of sec. II,D,4 the Administrative Law Judge found that Rose was suspended for 1 day while the record shows, and we find, that he was merely reprimanded; in the last sentence of par. 8 of sec. II,D,4, the name "Capasso" should be substituted for the name "Brilz" after the words "and that"; and in par. 2 of sec. IV the word "discharged" should be inserted after the words "making whole all employee."

tive Law Judge's findings were also based on demeanor.[2] In these circumstances, we conclude that there is no basis to overturn the Administrative Law Judge's evaluation of credibility based on demeanor and the record as a whole with respect to the Administrative Law Judge's findings of independent 8(a)(1) violations.[3]

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[2] *N.R.L.B.* v. *Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S. 404, 408 (1962).

[3] We agree with the Respondent that Mariano Rivera and Ignacio Marrero did not testify that around August 5, 1975, Celestino "Tino" Hernandez told them separately that they, Adrian Velez, and William Negron would be fired if the Union lost the election and if the Union won the election they would be transferred to different jobs or pushed out of the Company one-by-one. In fact, Velez credibly testified that Hernandez made the statements to him and that Velez then had a conference with Marrero and Rivera and told them what Hernandez had said. In agreement with the Administrative Law Judge, we find, based on the credited testimony of employee Adrian Valez, that such statements were made and that Respondent thereby violated Sec. 8(a)(1).

The Respondent has excepted to certain other credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (CA. 3, 1951). We have carefully examined the record and find no basis for reversing his findings. Nor do we find merit in Respondent's contention that because the Administrative Law Judge credited the General Counsel's witnesses, his credibility resolutions are erroneous or attended by bias or prejudice. *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656 (1949). Accordingly, we find no basis for distributing the Administrative Law Judge's findings in this case.

2. We agree with the Administrative Law Judge that Respondent unilaterally instituted and enforced a written warning notice-discipline system without first bargaining with the Union in violation of Section 8(a)(5) and (1) of the Act. However, the Administrative Law Judge failed to find additionally that the warning notice system was implemented in violation of Section 8(a)(3), despite the fact that the amended complaint alleged that the system was instituted because Respondent's employees had engaged in union and/or protected concerted activity, because the 8(a)(5) finding afforded the same remedy as that which would have been appropriate pursuant to an 8(a)(3) finding. The Administrative Law Judge further stated that "it would be an exercise in futility and merely further prolong a long decision to go through the circumstances of all these warning notices." Contrary to the Administrative Law Judge, it is not necessary to examine the merits of each individual warning notice in order to find an 8(a)(3) violation as the evidence herein is sufficient to show that Respondent instituted the written warning notice-discipline system because of employees' union activity.

Thus, the Administrative Law Judge stated in his Decision that:

> There are examples which will be detailed further infra, where this written warning notice system was used by supervisors in an apparent effort to build cases against known union sympathizers and where this occurred it violated Section 8(a)(3) of the Act as well. There are other incidents which were alleged as being violative of Section 8(a)(3) and (1) where a warning to an employee might have been warranted because of what the employee did. But that is not the question. The question presented in this case is whether Respondent, by what it called its amplification of a rule and what

General Counsel calls its implementation and enforcement of a brand new set of rules, violated Section 8(5), (3) and (1) of the Act.

The fact that the Administrative Law Judge found certain uses of the warning notices to be illegally motivated supports a finding that the system was instituted with the same illegal motivation in violation of Section 8(a)(3) of the Act. Prior to the institution of the system and before the employees' selection of the Union as their exclusive bargaining representative in an election, Respondent made threats to numerous employees concerning its intentions if the Union won the election. Thus, it warned that the Company could make it "rough" on union sympathizers and that employees could be "hurt" and "things would be different" if the Union came in. Almost immediately after the election, in which the employees overwhelmingly voted in the Union, Respondent initiated its written warning notice-discipline system. It did not inform employees, however, that they would be "uniformly" subject to this system.

Respondent contends that the system was instituted to assure more accurate recordkeeping because of a potential "new experience in terms of grievances, arbitration and perhaps even NLRB charges." However, inherent in Respondent's rationale for adopting the system is the idea that the system would not have been instituted but for the employees' initial action in seeking union representation. Indeed, had more accurate recordkeeping been Respondent's sole objective, Respondent could have accomplished this objective without giving out warning notices to employees and creating a new system of employee discipline. Rather, Respondent's illegal motive is revealed in statements made to employees upon receipt of warning notices and particularly in the revealing, credited, and undenied testimony concerning the conversation between Supervisors Colosi and Bonner which was overhead by employee Keith Uelsmann. During this conversation, Colosi told Bonner that if the Company could get rid of the union people and replace them with employees who would support the Company, they could overthrow the Union. Bonner replied. "You just can't go around and fire union people; you have to give them warning slips or the Union will just get them their jobs back."

The fact that all warning notices to employees and consequent discipline of employees pursuant to the system after the election may not have been unwarranted does not negate Respondent's illegal motivation in instituting the system. For if the motivation was illegal and retaliatory, the effect of the application of the system to employees, regardless of whether their conduct warranted any disciplinary action, could only have pointed out to employees that the Respondent was attempting to discourage union adherence.

Respondent further explained the warning slips by arguing that it was merely refining, adjusting, and improving the use of procedures previously employed. We do not agree. The foregoing and the record as a whole show Respondent made it indelibly clear to the employees why the changes were being made. Accordingly, we conclude that the institution of the system additionally violated Section 8(a)(3) and (1) of the Act,[4] and shall order Respondent to cease and desist from instituting and imposing a written warning notice-discipline system because of employees' union activity.

3. In his Decision, the Administrative Law Judge failed to find that Respondent unilaterally instituted two specific tentatively agreed to contract provisions—namely—a 60-

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[4] *Alberts, Inc.*, 213 NLRB 686 (1974); *Evans Products Company*, 160 NLRB 1822 (1966).

day probationary period[5] and a call-in rule. Although the Administrative Law Judge labeled Respondent's action in instituting the 60-day probationary period as unilateral action and made findings of fact with respect to the institution of the call-in rule, he failed to explicitly find that Respondent's unilateral action in instituting the two rules violated Section 8(a)(5) and (1) of the Act. We agree with the General Counsel that such conduct violated Section 8(a)(5) and (1) of the Act.[6]

We agree with the Administrative Law Judge that prior to the institution of the 60-day probationary period provision on February 5, 1976, Respondent and the Union agreed to a layoff and seniority list, without mention or consideration of the 60-day probationary period. With respect to the call-in rule, the evidence shows that it was instituted in about December 1975, and was thereafter applied to employees by means of the written warning notice-discipline system. Prior to the application of the tentatively agreed to call-in rule, and since the institution of the written warning notice-discipline system after the election, Respondent had applied a 9 a.m. call-in rule.[7] Respondent neither informed employees of the call-in rule prior to its application by means of the disciplinary system, nor of the 60-day probationary period prior to its application to Marrero and the other six employees.

Although these provisions had been tentatively agreed to in negotiations between Respondent and the Union, negotiations had not been completed and the contract had not been submitted for ratification, a condition which Union Business Representative Haderly clearly made a condition precedent to final agreement on a contract. Further, there was never any agreement between the parties that particular contract provisions could be implemented nor was there any agreement between the parties that contract provisions would be implemented as soon as they were tentatively agreed upon.[8]

In these circumstances, we find that the Respondent's institution of the 60-day probationary provision and the call-in provision without bargaining with the Union as to the institution of the provisions violated Section 8(a)(5) of the Act. Accordingly, we shall order Respondent to cease and desist from implementing the 60-day probationary provision and call-in provision and to bargain on request about these matters.

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[5] The Administrative Law Judge did find that Respondent's use of the tentatively agreed to probationary period was a subterfuge to allow it to lay off Ignacio Marrero in violation of Sec. 8(a)(3) and (1) and its application of six other employees was a part of the subterfuge and thus violated the Sec. 7 rights of the six employees.

[6] Although not specifically alleged in the complaint or amended complaint, the institution of these two tentatively agreed to contract provisions was fully litigated at the hearing and is in accord with the substance of the complaint. Further, the counsel for the General Counsel argued that the institution of the two tentatively agreed to contract provisions violated Sec. 8(a)(5) and (1) in their brief to the Administrative Law Judge. *Ref-Chem Company,* 153 NLRB 488 (1965), fn. 16; *Rocky Mountain Natural Gas Company, Inc.,* 140 NLRB 1191, 1192 (1963), enfd. as modified 326 F.2d 949 (C.A. 10, 1964).

[7] The 9 a.m. rule required employees to call in in case of absence or tardiness by 9 a.m. The rule was "uniformly" applied to employees after the election by means of the written warning notice-disciplinary system. Pursuant to the system, for a first offense, an employee would receive a verbal warning; for a second offense, an employee would receive a written warning; for a third offense, an employee would receive a written warning and 3-day suspension; and for a fourth offense, an employee would be discharged.

[8] With respect to the 60-day probationary period provision, in particular, the parties never agreed that it would be applied retroactively.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Electri-Flex Company, Roselle, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in violation of Section 8(a)(5) and (1) of the Act with District No. 122, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative of its employees by unilaterally initiating and imposing a warning and disciplinary procedure.

(b) Instituting and imposing a system of written warning notices and discipline for our employees because of their union activities.

(c) Unilaterally instituting a 60-day probationary rule and a call-in rule without notification to and bargaining with District No. 122, International Association of Machinists and Aerospace Workers, AFL-CIO.

(d) Transferring, discharging, laying off, or suspending employees because of their known or suspected union sentiments and activities or in furtherance of the unilaterally imposed warning and disciplinary procedure.

(e) Terminating employees because of their giving information to the National Labor Relations Board.

(f) Interrogating employees about their own union sentiments and activities and those of other employees.

(g) Threatening employees with the loss of benefits or employment or with other reprisals if they support the Union.

(h) Promising employees benefits for withdrawing support from the Union.

(i) Threatening employees with reprisals for taking matters to the Board and promising benefits for withdrawing charges from the Board.

(j) Creating an impression of surveillance of union activities of employees and maintaining lists of pro and anti-union employees.

(k) In any other matter violating the Section 7 rights of employees.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Bargain on request about a written warning and disciplinary procedure, a 60-day probationary rule, and a call-in rule and if an agreement is reached embody such agreement in a written document.

(b) Offer reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, and make whole all employees transferred, discharged, laid off, or suspended under the operation of the unilaterally imposed warning and disciplinary procedure including Adrian Velez, Martin Ibarra, Tony Capasso, Juan Martin, and Ignacio Marrero, and to those laid off under the unilaterally revised and discriminatorily imposed layoff list including Ignacio Marrero, Teodoro Feliciano, Gilbert Espinosa, Juan Santiago, Luciano N. Lopez, Daniel V. Perez, and Sebastian Gomes and make them whole in accordance with the recommendations set forth in "The Remedy" in the Administrative Law Judge's decision.

(c) Remove from the personnel or other files of employees all disciplinary warning letters or memoranda issued since August 7, 1975.

(d) Post at its plant in Roselle, Illinois, copies in both English and Spanish of the attached notice marked "Appendix."[9] Copies of said notice, in both English and Spanish, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the 8(a)(1) allegation concerning Feliciano and Luis Caban and the allegation concerning bypassing the Union and soliciting grievances and the 8(a)(3) and (1) allegation concerning Hermenejildo Mendoza be dismissed.

Dated, Washington, D.C. March 17, 1977.

Howard Jenkins, Jr., Member
John A. Penello, Member
Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Decision of United States Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 77-1515

ELECTRI-FLEX COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition to Review and Set Aside a Decision
and Order of the National Labor Relations Board
and Cross-Application for Enforcement.

ARGUED NOVEMBER 9, 1977—DECIDED FEBRUARY 14, 1978

Before TONE and WOOD, *Circuit Judges*, and WYZANSKI, *Senior District Judge.*[*]

WOOD, *Circuit Judge.* Electri-Flex Company (hereinafter referred to as the company) petitions this court, pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, to review a Decision and Order of the National Labor Relations Board. The Board has filed a cross-application for enforcement of its order.[1]

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[*] The Hon. Charles E. Wyzanski, Jr., Senior District Judge of the District of Massachusetts, is sitting by designation.

[1] The Board's Order was issued on March 17, 1977 and is reported at 228 NLRB No. 79.

The company contends there is not substantial evidence to support the Board's finding that the company interfered with or restrained the employees in their unionization efforts or that the company improperly discharged and transferred pro-union employees. In addition, the company seeks review of the violations found in respect to its use of a written warning system, and the implementation of tentatively approved contract provisions, a call-in rule and a 60-day probationary provision.

A.

The Interference Charge

The company contends the record lacks the substantial evidence necessary to support the Board's findings that it interfered with, restrained, and coerced its employees in the exercise of their statutory rights and thus violated Section 8(a)(1) of the Act.

In applying the "substantial evidence" standard we are aware of our duty to examine the entire record, including the evidence opposed to the Board's view, to determine whether the record contains "such evidence as a reasonable mind might accept as adequate to support a conclusion" and to find that the decision is "justified by the fair estimate of the worth of the testimony of the witnesses or its informed judgments on matters within its special competence." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 487-90 (1957).

The testimony before the Administrative Law Judge (hereinafter referred to as ALJ) revealed that there had been interrogation by the company of its employees in regard to their union activity, and that discharge and other forms of reprisals were threatened if the employees supported the union or signed the authorization cards. In addition, the company promised to place those who voted for the company in management positions in an effort to dissuade employees from supporting the union. Other

testimony revealed that the company maintained lists of employees on the basis of pro or anti-unionism, creating the impression that it had its employees under surveillance. We find there is substantial evidence to support the Board's finding of a violation of Section 8(a)(1).

The company also objects, claiming the ALJ used an "unnatural and legally unsupported test" relying solely on the absence of specific denials by the supervisors who engaged in the violative conduct.

The Board found that the ALJ even though not making explicit credibility findings, implicity resolved conflicts in the testimony "by accepting and relying on the testimony of the General Counsel's witnesses," and in addition that the findings were based on demeanor. We agree with the conclusion reached by the Board that "there is no basis to overturn the . . . evaluation of credibility based on demeanor and the record as a whole. . . ." See *NRLB v. Brasfell Motor Freight Lines,* 486 F.2d 743, 745 (7th Cir. 1973).

B.

The Discharge and Transfer Violations

The Board found that the company violated Section 8(a)(3) in its actions involving employees, Adrain Velez, Martin Ibarra, Juan Martin and Tony Capasso and additionally violated Section 8(a)(4) as to Tony Capasso.

The controlling principle behind the finding of a Section 8(a)(3) violation is that the company's action or decision was discriminatorily motivated. *NLRB v. National Food Stores, Inc.,* 332 F.2d 249, 252 (7th Cir. 1964). In determining this motivation, the Board may consider circumstantial as well as direct evidence. Further, while it is necessary for this court to determine whether there is substantial evidence on the record as a whole to support the decision of

the Board, the decision is entitled to judicial affirmance, "even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. at 488.

Finally, we note that absent exceptional circumstances, credibility resolutions are within the province of the trier of fact. *Sarkes Tarzian, Inc. v. NLRB*, 374 F.2d 734, 736 (7th Cir. 1967).

Below we give a brief review of the circumstances surrounding these incidents.

The records show that Adrian Velez's transfer from the position of set-up man to packager occurred within days of interrogation by company supervisor regarding his union sentiments and his admission that he had signed a union card. The company's statements and treatment of Velez following this July 16 transfer also indicate that the company was attempting to get rid of him prior to the union election, because they viewed him as a union sympathizer and activist.

As to Martin Ibarra, the record shows that his transfer from set-up man to machine operator occurred on the very same day he was observed distributing union handbills. The ALJ indicated he was not crediting the testimony of the company's representative, that Ibarra had been transferred because of dissatisfaction with his work.

Juan Martin had been employed by the company since 1971. He became active in the unionization efforts at the company, signed an authorization card, attended meetings and distributed handbills on the day of the election. The company was aware of his union activity. Martin was fired by the company on January 28 after a disputed incident involving another employee. The ALJ indicated he was crediting the employee's version, which indicated that the

incident was merely an "insignificant bumping" rather than a fight and found that the company magnified this minor incident to enable it to rid itself of a pro-union adherent.

Tony Capasso was known by the company to be a union supporter, having been questioned about it by his supervisor, and was told that things would be made rough for union supporters. In October, Capasso was confronted with the information that the company was aware that he had made a complaint to the Board and was told by foreman Brilz that he could have his job if he wanted it. Later there was an incident involving an infraction of the company rule to wear safety shoes, where Capasso was given a 3-day suspension in comparison to only one day given another employee for the same violation on the same day. The company claimed a "threat" was made by Capasso at this time and that this was the cause for his termination two days later. The ALJ specifically credited the testimony of Capasso over that of the company representative Colosi, finding that the discharge had not occurred as Colosi testified and that it was Capasso's union activity which had caused the company to terminate him.

Applying the principles given above to the facts of this case, we feel there is substantial evidence in the record to support the finding of the board that a discriminatory motive prompted the company's decision to transfer Adrian Velez, to transfer Martin Ibarra, to discharge Juan Martin, and to discharge Tony Capasso. Further, the fact that Tony Capasso had given information to the National Labor Relations Board was an additional motive prompting his discharge, thus violating Section 8(a)(4).

C.

The Written Warning System

The written warning system[2] was found to be a new disciplinary system in that it amounted to a significant change from the previous system, that it had been implemented without bargaining with the Union and therefore was a violation of Sections 8(a)(5) and (1) of the Act. The Board, in addition, found that the record supported a finding that the system was implemented with the illegal motivation of harassing and retaliating against union supporters and sympathizers, and therefore also violated Section 8(a)(3) of the Act.

In objecting the company presents three arguments. First, it is contended that a company's mode of discipline is not a mandatory subject for bargaining and rather is within the area of "management prerogative." *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). While it is true that the Act does not take from the employer the right to enforce reasonable rules for the conduct of the business and take disciplinary action against employees who either violate the rules or are generally not suitable for efficient production, *NLRB v. Mylan-Sparta Co.*, 166 F.2d 485 (6th Cir. 1948), it is equally true that the institution of a new system of discipline is a signficant change in working conditions, and thus is one of the mandatory subjects for bargaining under the provisions of Section 8(d) of the Act, included within the phrase "other terms and conditions of employment." *NLRB v. Amoco Chemicals Corp.*, 529 F.2d

[2] Pursuant to the written warning notice-disciplinary system, for a first offense, an employee would receive a verbal warning; for a second offense, an employee would receive a written warning; for a third offense, an employee would receive a written warning and 3-day suspension; and for a fourth offense, an employee would be discharged.

427, 431 (5th Cir. 1976); *NLRB v. Gulf Power Corp.*, 384 F.2d 822, 823 (5th Cir. 1967).

Thus it is necessary to determine if there was evidence to support the finding by the Board that the written notice system was a new system of discipline, or a significant change from the previously existing system. The company admits there was an increase in the numbers of written warnings issued after the arrival of the union, but states that the record does not support the conclusion that this was a change in kind, rather that it was only a change in quantity.

The record reveals, however, that before the election the company primarily disciplined its employees verbally, and only occasionally issued written warning notices. This conclusion is supported by the evidence that from January, 1972[3] until the arrival of the union a total of thirteen warning slips had been issued by the company, primarily relating to safety violations.[4] In the period following the election until the time of the hearing, April 1976, a period of only nine months, there was a total of 147 warning slips issued.

[3] In their reply brief the company objects to January, 1972 as the beginning reference date for the use of the warning tickets, claiming it did not commence use of this until approximately January, 1973. However, the record reveals (Tr. 995-96) that it was company's counsel who designated January, 1972 as the reference point. Even if January, 1973 were to be used, we can perceive of no different result.

[4] Of the thirteen, nine were for safety violations. A review of the company's chart on pages 23-25 of their brief shows that the last pre-union warning notice was issued in February, 1975. There were no warnings issued again until July, 1975 (G. C. Ex. 128), when the unionization efforts were well under way. This July warning is not included as one of the pre-union or post-union notices.

A review of these written warning slips reveals that while there was an increase in notices for safety violations, there was as well a marked increase in the number issued for such reasons as "bad attitude," "poor production," "failure to follow instructions," and "talking."[5]

We find that both the sudden increase in the sheer number of notices issued as well as the increase in those issued for what can generally be called non-safety violations, provide sufficient basis for the Board's conclusion that the written warning system was in effect a "new" disciplinary system and a significant change in working conditions which had been implemented prior to bargaining with the union and was thus a violation of Section 8(a)(5).

The company's second argument, waiver by inaction, is based on the allegation that the union made no objections to the use of these warning notices during the five weeks between the election and a meeting held on September 18th, where this matter was discussed. It is unnecessary under the facts here for this court to define the circumstances where inaction constitutes waiver, for here the facts do not support a finding of inaction. There is nothing in the record to indicate that the union had been made aware of the use of this system during this five-week period. The company points only to the fact that it was in use and it had not tried to hide this use to show therefore that the union knew and acquiesced by not saying anything. The only testimony as to the union's knowledge was that of employee Marrero who stated he notified the union of the use of warning tickets around September 16, when he received his second such notice within five days. The union then contacted the company and a meeting was arranged to discuss the matter on September 18. After this meeting the company continued in its use of the notices and charges were filed on October 1, 1975. These facts do not support a theory of inaction.[6]

[5] See also Section D, *infra*, and the use of warning notices for violation of the call-in rule.

The company also contends that the union expressly agreed to the use of written notices as a disciplinary system at the meeting which took place on September 18, and therefore waived its right to object later. The union representatives, however, testified that they were told by the company representative at this meeting that the warning slips were not being used for disciplinary reasons, but only as a corrective measure. The ALJ specifically indicated that he was crediting the testimony of the union agents, Haderly and Menendez, over that of the company representative, and that there was no other evidence which would support a finding that the union had agreed to the use of this system as a disciplinary system. We are not presented here with any exceptional circumstances which would warrant departure from the rule that "the Board's action in crediting or discrediting witnesses will not ordinarily be disturbed on review." ***Sarkes Tarzian, Inc. v. NLRB, supra.***

As to the Board's additional finding that the system also violated Section 8(a)(3), the company objects on the basis that the Board failed to find on an "incident-by-

[6] The company contends that the union's subsequent contract proposal which was accepted by the company reveals that the union sanctioned the use of written warning notices as a disciplinary system. However, we fail to see how a subsequent agreement can show union approval that the system be unilaterally imposed before the provision was even proposed. As discussed *infra,* Section D, even if there had been tentative approval for the use of the system, this would not have allowed the company to put the system into effect prior to ratification of the entire contract by the employees.

incident basis" that illegal motivation was behind the issuance of each notice. Further, that the system could not be said to be a retaliatory system, since its overall effect was an improvement or a moderation of the pre-union situation, which was characterized by termination for infractions of the company rules. However, having examined the record as a whole, we are convinced that the Board was correct in finding that the disciplinary system also violated Section 8(a)(3).

First, it was alleged in the amended complaint that the system was instituted because of union activity. We also note that the Board's finding of an additional violation did not contradict the fact findings of the ALJ, who found that certain uses of the warning notices were illegally motivated. Prior to the union election, the company made threats to its employees that it would make it "rough" on union sympathizers and that "things would be different" if the union came. Within days of the union election, the company began uniformly imposing a system of written notice with no prior notification to the employees that all infractions of the company rules now would be enforced with this system.

The company's motive in instituting the system was revealed in its statements to employees upon receiving a warning notice, namely, that it was because of the presence of the union that the notices were necessary.[7] The company's explanation was that it was necessary to improve its system and assure more accurate record keeping, since it expected "new experiences, in terms of grievances, arbitrations and perhaps even NLRB charges." As the Board

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[7] For example, when Rivera received a warning notice for failure to call in, he was told "[Y]ou guys brought the union here, that's what you get for bringing in the union." (Tr. 133-34).

noted, inherent in this explanation is the idea that it was the presence of the union which made the system necessary.

In addition to the increase in the notices issued and the statements made to employees, there was the testimony concerning a conversation between supervisors Colosi and Bonner which was overheard by one of the employees. During this conversation, Colosi told Bonner that if the company could get rid of the union people and replace them with employees who would support the company, it could overthrow the union. Bonner replied: "You can't just go around and fire union pepole; you have to give them warning slips or the Union will just get them their jobs back."

The company's claim that it was impossible for the Board to find an "illegal motive" since some of the tickets may have been warranted, misses the point. It is motivation, not justification, which determines the existence *vel non* of discriminatory motive. While disciplinary action may have been warranted in some instances this does nothing to refute the charge made by the union and the finding of the Board that the system as a whole was implemented for a retaliatory purpose, and was being used as a way of harassing and justifying dismissal of union sympathizers. We find there is substantial evidence to support the finding of a Section 8(a)(3) violation in the implementation of the warning system.

D.

The Call-In Rule

The company also objects to the finding by the Board that the company's call-in rule, which required employees to report by a specified time if they were going to be absent, violater Section 8(a)(5).

First, it is necessary to address the company's claim that the Board was precluded from finding this violation because it had not been alleged in the complaint. As the Board noted when this argument was addressed to them, one of the charges in the complaint was that the company had committed conduct violative of Section 8(a)(5) and this allegation was sufficient to provide notice. Also, and most importantly, the facts pertaining to the call-in rule were litigated at the hearing and the ALJ made findings of fact in regard to the rule.[8] This court has held that "even where a complaint is devoid of notice of the unfair labor practice found, due process is satisfied where there has been full litigation of the issues." *NLRB v. Duncan Foundry and Machine Works, Inc.*, 435 F.2d 612, 615 (7th Cir. 1970).[9]

The company argued that a 9 a.m. call-in rule was a plant rule which had always been in force and that by instituting the tentatively approved 11 a.m. call-in rule, it was merely attempting to improve its system in accordance with union demands on which agreement had already been reached at the bargaining table.

The pre-union work rules presented to the ALJ reveal that the Spanish translation[10] of the section pertaining to the call-in rule did not specify any particular time as the deadline for calling in.

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[8] The ALJ did not find the rule to be a violation of the Act. However, the finding by the Board was not inconsistent with the facts as found by the ALJ.

[9] The company made this same argument as to the violation found in connection with the probationary provision discussed in Section E, *infra*. We reach the same conclusion as to that provision.

[10] The importance of this fact is that approximately three-fourths of all the employees at the company are Spanish-speaking many of them speaking no English at all.

Employees testified that they were not aware of a time limit in connection with the call-in rule, nor had it ever been applied to them until after the arrival of the union.[11] Mr. Kinander, who testified for the company, admitted that prior to the election the rule had been enforced inconsistently. The records submitted by the company to support its position of the pre-existence of the rule, reveal that while disciplinary action was taken due to "no call" prior to the election, not only is there no mention of any specific time, but in all instances cited there had been the total absence of any call by the employee, usually involving a period of days. However, starting with the warning notice issued on September 30, 1975, there was detailed reference to the fact that the company required a 9 a.m. call-in time.

The company contends that it has been placed on the horns of a dilemma, since if it had remained with its older, stricter method of enforcement of the rule, termination, it could have been found in violation of the Act, and that by attempting to institute a liberalization of the rule, it has also been found in violation of the Act. However, his very appealing representation of the company's position is a misrepresentation of the objections of the General Counsel and the finding of the Board. While the General Counsel was objecting to the implementation of the tentatively approved "11 a.m. provision," it was not because it was a liberalization of an already existing rule, but because the call-in rule did not exist, as it was now being applied, prior to the union election. Thus, the General Counsel argued

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[11] Ignacio Marrero, one of the elected union representatives, was contacted at his home by a fellow employee who had just been told he was fired for failure to call-in on time. Marrero placed a call to protest this action, and was told that he also was being discharged for failure to call-in before 9 a.m. He testified that he had not been aware of any 9 a.m. rule prior to this incident.

and the Board agreed, the implementation of the 11 a.m. rule, even though it had been tentatively approved, was an unlawful unilateral change in employment conditions violative of Section 8(a)(5).

Next the company argues that it cannot be said that it has "failed to bargain," which is the essence of a Section 8(a)(5) charge, since tentative agreement had been reached. This situation is not covered by the rule announced in *NLRB v. Katz,* 369 U.S. 736 (1962), according to the company, since the provision is no longer "under discussion." Rather, the company urges since it was no longer free to withdraw from and repudiate already approved provisions under the teachings of *American Seating Co. v. NLRB,* 424 F.2d 106, 108 (5th Cir. 1970), and *San Antonio Machine and Supply Corp. v. NLRB,* 363 F.2d 633, 636-37 (5th Cir. 1966), and would have been free to implement change which had been rejected by the union, even though no impasse had been reached, under the teaching of *NLRB v. Bradley Washfountain Co.,* 192 F.2d 144 (7th Cir. 1951), that it is obviously not an unfair labor practice to implement provisions on which tentatively agreement has been reached between the union and the company.

We express no opinion as to what the result might have been had the parties been silent as to the time and method of implementation for the tentative provisions, and the employees had been notified prior to the implementation of the changes, but that is not the situation here.

The union representative, Mr. Haderly, testified that prior to and at all times during negotiations, the position of the union, which had been stated to the company, was that no agreement reached during negotiations was effective until ratified by the employees. The evidence shows that the employees had not been informed of the implementation of the call-in rule, and only learned of its existence

through violation of the rule. Accordingly, we find that because there had been no agreement nor understanding that tentatively approved proposals were to go into immediate effect, there was the possibility that further revisions would or could be made before ratification and implementation of the provision,[12] thus bargaining may not have been completed on the provisions. We find that there was sufficient evidence for the Board to conclude that the implementation of the call-in rule was a violation of Section 8(a)(5).

E.

The 60-Day Probationary Provision

The company objects to the findings of the Board that the use of the 60-day probationary provision constituted violation of Sections 8(a)(5)(3) and (1).

The facts surrounding the provision are as follows:

As with the call-in rule, the company and union following the election reached tentative agreement as to seniority provisions, including the use of a 60-day probationary period. As was the case with all tentatively approved provisions, the union had stipulated that no agreement reached during negotiations was effective until ratification. In January, 1976 the company notified the union that it would be necessary, due to temporary difficulties, to lay off some 30 employees. A meeting was held on January 22, and a list of those to be laid off, effective January 23, based on seniority, was presented to the union. Included on the list was Ignacio Marrero, one of the recently elected union

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[12] The company itself admits this fact in their brief, but adds that this was unlikely. This court does not wish to engage in speculation as to whether it was likely; the fact remains that both sides agree that further negotiations were possible.

committeemen, who was also present at the meeting. He objected to the seniority date given to him by the company, April 8, 1975, and showed a letter which gave his date as October 29, 1974. After checking his file, it was agreed by both sides that the October date was correct. This change removed Mr. Marrero's name from the layoff list. When this mistake was discovered, the dates of all those on the list were checked and errors were discovered in eight cases, in all instances the employee having greater seniority than originally indicated on the list. However, these corrections only resulted in three changes in the layoff list: in addition to the removal of Marrero's name, the two employees with the greatest seniority were removed apparently as the result of the agreement to reduce the layoff to only 28 employees.

There was conflicting testimony as to whether the union was advised at this first meeting that the 60-day probationary provision was being used to determine the seniority date of employees. The testimony of the union representative was that no mention was made, either at the beginning of the session nor at any time during the meeting, including the extensive checking of employees files that took place at the meeting. The testimony of the company representative, Mr. Kinander, was found by the ALJ to be inconsistent. Although at one point he stated that mention was made at the beginning of the first session that the layoff was to be according to the "tentatively agreed provisions," he later stated that no specific mention was made of the 60-day probationary period. There was no explanation of why no mention was made of the critical provision during the rechecking of seniority date of those on the list, even though eight corrections were made. The testimony of Mr. Colosi, who also represented the company at these meetings, was found by the ALJ to be both vague and "disingenuous."

The company sent to the union a list, dated January 26, indicating the seniority dates of all employees. There was no objection by the union to any of these dates and there was no discrepency between the dates on this list and the corrected January 22 list. On January 28, during a meeting about other matters, the union was supplied with a list of all those employees that had been laid off on January 23. This list incorporated all the corrections that had been made at the January 22 meeting and was in accordance with the January 28 list.

About a week later the union was contacted by the company and was told that there were errors on the layoff list and a meeting was scheduled for February 5. At that meeting the company stated that Marrero was being placed back on the list, since he had never completed his 60-day probationary period and therefore his seniority had been incorrectly computed. The union protested this action. Mr. Haderly testified that he reminded the company that the provision had been only tentatively agreed to and required ratification before it was effective, that the use of this provision had never been discussed nor approved by the union for this layoff, and particularly that the union had never discussed at any time or approved the retroactive use of the provision. At the conclusion of the meeting the union was told by Mr. Colosi that "we are calling the person with most seniority back, but we are not calling back those that did not complete the probationary period."[13] The union filed a complaint regarding this action.

From these facts the ALJ found that the provision had been used as a subterfuge to allow the company to lay

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[13] Colosi's report of the same incident was that "we told the Union at that time that we were not going to call these people back," identifying them as the "probationary people."

off Ignacio Marrero, the union leader, and thus was a violation of Section 8(a)(3). Further, that the use of the provision violated the Section 7 rights of the six employees and that refusal to recall them violated Section 8(a)(1). The Board agreeing, additionally found that the provision amounted to unilateral action in violation of Section 8(a)(5).

As to the Section 8(a)(5) violation, the company argues, as it did with the call-in rule, that the implementation of a tentatively approved contract provision, particularly when it is beneficial to bargaining unit employees,[14] is not the kind of action which offends the policies of the Act, since the union has not been bypassed. However, as already pointed out in connection with the call-in rule, while the parties had tentatively agreed to the substance of the provision, the union had stipulated that no provision was to be effective until ratification; consequently, it was open to further negotiations.[15] Particularly we note that the parties had not yet bargained and agreed as to the effective date of the implementation of this provision, or whether it was to be applied retroactively to those already employed by the company. We also note that the facts as recited above, and the resolution of the issue, of whether the union had been told of the use of the provision, against the company, would indicate that the parties had agreed to a method of seniority for the layoff and that this was changed by the company on February 5. Consequently, we agree with the conclusion reached by the Board that by so doing the company engaged

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[14] That it is a "beneficial" provision might be disputed by some of the employees. For example, if it were to be used, Marrero would suffer a loss of six months in the computation of his seniority date, since the company had to lay him off during his initial period of employment with the company.

[15] *See* n. 12, *supra*.

in unilateral action affecting conditions of employment which were still under negotiations, and such action "must of necessity obstruct bargaining" and thus violate Section 8(a)(5). *NLRB v. Katz,* 369 U.S. 736, 847 (1962).

We move now to the Board's finding that the company discriminatorily used the probationary provision as a subterfuge to rid itself of Ignacio Marrero, a leading union advocate, thus violating Section 8(a)(3). It is undisputed that if the company had laid off Marrero when his seniority was computed as October 1974, i.e., taking him out of seniority order, such action would have constituted a clear violation. *NLRB v. Henry Colder Co.,* 416 F.2d 750, 753 (7th Cir. 1969). We find that there is substantial evidence on the record to support the finding that the company used the probationary provision to manipulate the seniority date of Marrero, so that it would be able to include him on the layoff list.

The record reveals that Marrero was a union activist and leader, he was one of the employees responsible for bringing the union to the company, and was one of the recently elected union representatives. The company does not dispute that it was opposed to the coming of the union. We recognize that a violation cannot be found solely on the proof that an employee was active in the union and the employer was opposed to the union, *Nix v. NLRB,* 418 F.2d 1001 (5th Cir. 1969). However, it is necessary to add to these two items the bad faith demonstrated by the company, when, having agreed to a layoff method and list at earlier meetings, it abruptly announced a "mistake" and made a change resulting in the addition of the union leader to the layoff list. Marrero was the only employee for which a change in seniority meant being added to the layoff. We believe there is sufficient evidence to find that the company had indeed used the provision to rid itself of one of the union leaders, thereby attempting to weaken the union, and as such was a violation of Section 8(a)(3).

However, we have considerably more difficulty with the finding that the company violated the Section 7 rights of six employees included on the layoff list, and that by failing to recall them the company has committed a violation of Section 8(a)(1).

The ALJ in his findings stated that the company "admitted it laid off others . . . because they had not served the 'probationary period,' " and the Board agreeing, ordered reinstatement for the six "laid off under the unilaterally revised and discriminatorily imposed layoff list." We can find no evidence to support either of these conclusions. There was no such admission made by the company that we have been able to find. The record on the contrary indicates that the six employees in question were included on the original list submitted by the company on January 22.[16] There was nothing unusual in their names appearing on this list, since all six had been hired during the previous month; they apparently were included because they had least seniority, the agreed upon method for the layoff. The union did not dispute their seniority dates, nor their inclusion on the list. We can perceive of no way in which these facts show that it was the subsequently used probationary period which caused them to be included on the layoff list.

Similarly, there is no evidence which would indicate that it was their union status which caused them to be placed on the layoff list.

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[16] It has always been the position of the union that the probationary provision was not being used at the time the first list was presented to them and that it was the later use of this provision which constituted a violation. We find it to be inconsistent for the union now to claim that these six were included on this first list only because of the probationary period provision.

However, even though we have determined that they were not laid off as a result of either retaliation or the probationary provision, it is still necessary to determine whether the company violated the Act by failing to recall these six employees.

The general rule is that "the Act does not purport to affect the right of the employer to select or discharge. He has the right to exercise judgment as to what employees should best be retained or recalled." *NLRB v. American Pearl Button Co.*, 149 F.2d 258, 260 (8th Cir. 1945). The Board's inquiry is limited to a determination of whether in the exercise of these decisions the employer acted so as to "interfere with, restrain, or coerce employees" in the exercise of their statutory rights.

Having already indicated that all parties agreed that the layoff was for legitimate reasons, and that there was no showing or charge that all those laid off were union sympathizers, we also note that there is no evidence which would support a finding that a discriminatory motive was behind the company's failure to recall these employees.[17]

Further, we can find no evidence of any agreement reached at the January 22 meeting, or any subsequent meeting, that any of the employees laid off were to be recalled, by seniority or any other method. The record does not indicate that as a matter of past practice the company regularly recalled those it laid off. In fact the record clearly shows a pattern of total discretion on the part of the company as to these decisions.

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[17] There was no evidence presented as to the union status of any of the six, and therefore no way to establish the company's knowledge of union activity, which is essential in order to prove that action is discriminatory. *Dubin-Haskell Lining Corp. v. NLRB*, 375 F.2d 568 (4th Cir. 1967).

We do not find the isolated statement of Colosi to Haderly to be sufficient proof to the contrary.[18] At most it indicates that the company agreed to recall Marrero, the person with the most seniority, as a concession to the union protests, but refused to make any further agreement or concession as to the recall of any other employees.

It is clear that if the tentatively approved probationary provision had been in effect, the six would have no recall rights.[19] While the company may have later improperly applied the provision to the layoff, and we have found such action to be a violation, it does not prove that the employees in question did have previously existing recall rights, as suggested by the Board in their brief,[20] particularly where the record shows a pattern of behavior which is in direct contradiction to such an assumption.

We conclude the Board's determination that the company violated Section 8(a)(1) by failing to recall the six laid off employees is not supported by substantial evidence and the Board's order is modified to reflect that the reinstatement of the six is set aside.

For the foregoing reasons, the company's petition to set aside the Board's order is denied. The Board's cross-petition for enforcement is granted as modified.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

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[18] See n. 13 and accompanying text, *supra.*

[19] The tentatively approved provision states: "There shall be no seniority among probationary employees, and grievances shall not be presented in connection with the discharge or layoff of probationary employees."

[20] The brief refers to the company's unilateral abrogation of seniority and recall rights [constituting] a change in the employment relation." (Br. at 28).

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

ELECTRI-FLEX COMPANY,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 77-1515

JUDGMENT

Before: TONE and WOOD, Circuit Judges and WYZANSKI, Senior District Judge.*

THIS CAUSE came on to be heard upon a petition filed by Electri-Flex Company, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on March 17, 1977, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on November 9, 1977, and has considered the briefs and transcript of record filed in this cause. On February 14, 1978, the Court, being fully advised in the premises, issued its decision denying the petition to set aside the Board's order, and granting enforcement of the Board's order, as modified. In conformity therewith, it is hereby

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* The Hon. Charles E. Wyzanski, Jr., Senior District Judge of the District of Massachusetts, is sitting by designation.

ORDERED AND ADJUDGED by the Court that Electri-Flex Company, Roselle, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (hereinafter called the Act) with District No. 122, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter called the Union), as the exclusive representative of its employees by unilaterally initiating and imposing a warning and disciplinary procedure.

(b) Instituting and imposing a system of written warning notices and discipline for employees because of their union activities.

(c) Unilaterally instituting a 60-day probationary rule and a call-in rule without notification to and bargaining with the Union.

(d) Transferring, discharging, laying off, or suspending employees because of their known or suspected union sentiments and activities or in furtherance of the unilaterally imposed warning and disciplinary procedure.

(e) Terminating employees because of their giving information to the National Labor Relations Board.

(f) Interrogating employees about their own union sentiments and activities and those of other employees.

(g) Threatening employees with the loss of benefits or employment or with other reprisals if they support the Union.

(h) Promising employees benefits for withdrawing support from the Union.

(i) Threatening employees with reprisals for taking matters to the Board and promising benefits for withdrawing charges from the Board.

(j) Creating an impression of surveillance of union activities of employees and maintaining lists of pro and anti-union employees.

(k) In any other matter violating the Section 7 rights of employees.

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act.

(a) Bargain on request about a written warning and disciplinary procedure, a 60-day probationary rule, and a call-in rule and if an agreement is reached embody such agreement in a written document.

(b) Offer reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, to all employees discharged, laid off, transferred, or suspended under the operation of the unilaterally imposed warning and disciplinary procedure, including Tony Capasso and Juan Martin. Offer such reinstatement to Adrian Velez and Martin Ibarra if their subsequent discharges in July 1976 and December 1976, respectively (now being litigated in Board Cases 13-CA-15687, 16353, and 16654), are found to be violative of the Act. Make whole all employees transferred, discharged, laid off, or suspended under the operation of the unilaterally imposed warning and disciplinary procedure, including Adrian Velez, Martin Ibarra, Tony Capasso, Juan Martin, and Ignacio Marrero, and make whole all employees laid off under the unilaterally revised and discriminatorily imposed layoff list, including Ignacio Marrero, all in accordance with the recommendations set forth in "The Remedy" in the Administrative Law Judge's decision.

(c) Remove from the personnel or other files of employees all disciplinary warning letters or memoranda issued since August 7, 1975.

(d) Post at its plant in Roselle, Illinois, copies in both English and Spanish of the attached notice marked "Appendix." Copies of said notice, in both English and Spanish, on forms provided by the Regional Director for Region 13 of the National Labor Relations Board (Chicago, Illinois), after being duly signed by Petitioner's authorized representative, shall be posted by Petitioner immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps Petitioner has taken to comply herewith.

IT IS FURTHER ORDERED AND ADJUDGED that costs shall be appropriately apportioned between the parties by the Court.

A True Copy:
Teste:

/s/ HARLINGTON WOOD, JR.
Circuit Judge, United States Court of Appeals for the Seventh Circuit

/s/ P. NEEDHAM
Deputy Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 19, 1978

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

ELECTRI-FLEX COMPANY, Petitioner, No. 77-1515 vs. NATIONAL LABOR RELATIONS BOARD, Respondent.	Petition for Review of an Order of the National Labor Relations Board.

This matter comes before the court on the "MOTION TO STAY MANDATE" filed herein on March 22, 1978 by counsel for the petitioner. The formal judgment of this court was not entered officially until June 6, 1978. Upon consideration of the foregoing facts,

IT IS ORDERED that the aforesaid motion be, and the same is hereby, GRANTED. Enforcement of the Board's order is hereby STAYED until July 27, 1978.

Supreme Court, U. S.
FILED
SEP 27 1978
MICHAEL RODAK, JR., CLERK

No. 78-154

In the Supreme Court of the United States

OCTOBER TERM, 1978

ELECTRI-FLEX COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID S. FISHBACK
Attorney
National Labor Relations Board
Washington, D.C. 20570

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A67-A88) is reported at 570 F.2d 1327. The decision and order of the National Labor Relations Board (Pet. App. A1-A66) are reported at 228 NLRB 847.

JURISDICTION

The judgment of the court of appeals (Pet. App. A89-A92) was entered on June 6, 1978. The petition

for a writ of certiorari was filed on July 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner's unilateral implementation of a written-warning disciplinary system violated Section 8(a)(3), (5), and (1) of the National Labor Relations Act; that petitioner's unilateral implementation of a retroactive 60-day probationary period and a call-in rule violated Section 8(a)(5) and (1) of the Act; and that the application of the probationary period rule to the layoff of a union committeeman violated Section 8(a)(3) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3-4.

STATEMENT

1. The Union [1] began organizing petitioner's employees in June 1975; it won a Board-conducted election and was certified as the employees' representative in August of that year. Negotiations for a collective bargaining agreement began on September 26, but as of the close of the record in this case in

[1] District 122, International Association of Machinists and Aerospace Workers, AFL-CIO.

May 1976, the parties had not agreed on a contract.[2] (Pet. App. A6.)

The Board found that, during the negotiations, petitioner violated Section 8(a)(5) and (1) of the Act by unilaterally instituting a 60-day probationary period and a call-in rule, and violated Section 8(a)(5), (3), and (1) by unilaterally imposing a new warning and disciplinary system.[3]

[2] Beginning in June 1975, and continuing into 1976, petitioner engaged in a wide variety of activity aimed at discouraging support of the Union. Between June and September 1975, petitioner's supervisors coercively interrogated employees about their union sentiments and activities (and those of other employees), threatened employees with loss of benefits and other reprisals if they supported the Union, promised benefits for refusing to support the Union, threatened employees with reprisals for taking matters to the Board, created an impression of surveillance of union activities, and maintained lists of employees who supported and opposed the Union (Pet. App. A6-A18, A48). Moreover, in January 1976, petitioner's vice-president promised benefits to an employee in return for withdrawal of charges before the Board (Pet. App. A49-A59), and in February 1976, petitioner's manufacturing manager warned another employee not to file a charge with the Board (Pet. App. A12-A13). The Board found that petitioner's conduct violated Section 8(a)(1) of the Act, the court of appeals upheld its findings, and petitioner does not appear to contest these findings in this Court (Pet. App. A52-A53, A64-A65).

[3] The Board, upheld by the court of appeals, also found that petitioner violated Section 8(a)(3) and (1) of the Act by transferring, laying off or discharging employees Velez, Ibarra, Martin, Marrero and Capasso in retaliation for their union activities. (Pet. App. A32, A34, A41, A46.) Petitioner contends that these findings are not supported by "substan-

The facts relating to these violations follow:

a. Written warnings.

Prior to the August representation election, petitioner rarely issued formal written warnings to its employees. Indeed, between January 1972 and the election, no more than 15 such warnings were issued, nearly all for safety violations. (Pet. App. A19, A73; Pet. 27-29; Tr. 993-994.)[4] Starting on the day of the election, however, petitioner began issuing written notices at an unprecedented rate—between August 7, 1975, and the commencement of the hearing in April 1976, 147 such written warnings were issued. (Pet. App. A20, A28-A29; Tr. 834-838.) In some cases, supervisors told employees that written warnings were being issued because of the presence of the Union (Pet. App. A20-A21; Tr. 133-134, 437-439, 444-446). Thus, manufacturing manager Mario Colosi told Superintendent Larry Bonner that the Union could be overthrown if its supporters could be eliminated, to which Bonner replied, "[Y]ou just can't go around and fire Union people. You have to give them warning slips or the Union will just get them their jobs back." (Pet. App. A20; Tr. 447.)

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tial evidence" but defers addressing this contention until "the issuance of a writ of certiorari" (Pet. 14).

The Board's finding that six additional employees were unlawfully laid off was not upheld by the court of appeals and is not in issue here (Pet. App. A52, A65, A88).

[4] "Tr." refers to the transcript before the Administrative Law Judge.

In mid-September Union business representative Frank Haderly learned of the increase in written notices and promptly raised the issue with petitioner's vice president, Bruce Kinander. Kinander assured Haderly that the notices were "just to advise [employees of their] shortcomings" and would "in no way" be used for disciplinary or discharge purposes. Haderly responded that if that was the only purpose of the written notices, he had no objection (Pet. App. A21-A22; Tr. 67, 101, 920-921, 1328-1329). However, at the hearing petitioner maintained that it at all times intended to use the slips for disciplinary purposes (Pet. App. A21-A22).

b. Marrero layoff.

In January 1976, while negotiations were still in progress, petitioner presented the Union with a plan for laying off 30 employees according to seniority, a move necessitated by economic circumstances. Included on the list was Ignacio Marrero, one of the three Union committeemen. Marrero protested that he had sufficient seniority to avoid a layoff, and five days later petitioner presented a revised layoff list to the Union, without Marrero's name. (Pet. App. A34; Tr. 75, 77, 80-84, 105-106, 938-942, 1032.) However, a week later petitioner claimed that because Marrero had not worked for 60 days following his original date of hire, his seniority date placed him within the laid-off group. Petitioner's claim was based on a tentatively agreed-upon term in the as yet unratified contract which provided that employees

must complete a 60-day probationary period before they could acquire seniority rights. Marrero was laid off over the Union's protest that the contract had not yet been ratified by its membership (a requirement that the Union repeatedly placed on the final acceptance of any of the contract's terms) and that, in any event, there was no agreement to apply the 60-day probationary period retroactively or to the layoff at issue. (Pet. App. A35-A37; Tr. 84, 86, 242, 939, 1499-1500.)

c. Call-in rule.

About three-quarters of petitioner's employees are Spanish-speaking, and many speak no English at all (Pet. App. A4; Tr. 54). Prior to the advent of the Union, petitioner required employees to call in if they could not come to work. The Spanish version of the rule made no mention of any time by which such a call must be made, although the English version said 9:00 a.m. (Pet. App. A23; Tr. 1128-1130). Beginning in late September petitioner began issuing warning notices to employees for failing to call in by 9:00 a.m. (Pet. App. A23, A79; Tr. 229, 1130-1131).[5]

[5] Thus employee Uelsmann received a warning notice on October 1 because he was ten minutes late and had not given the Company advance notice pursuant to the call-in rule. Foreman Brilz told him that if he was going to be absent he had to call in by a certain time and that "the Company has to give these out now * * * [t]hey have to protect themselves from the Union." (Pet. App. A20; Tr. 444-446.) Uelsmann received another warning notice in December, and Brilz again said that the Company was issuing the notices to guard against the Union (Pet. App. A21; Tr. 445).

Manager Colosi gave employee Rivera his first warning notice and a three day suspension for failing to call in and told him, "[Y]ou guys brought the union here, that's what you guys get here for bringing in the union" (Tr. 133-134).

2. Rejecting petitioner's assertion that in instituting the system of written warning slips "it was merely refining, adjusting, and improving the use of procedures previously employed" (Pet. App. A61), the Board, adopting the Administrative Law Judge's finding on the point, concluded that the drastic increase in the use of written warnings for disciplinary purposes constituted "a brand new system which [petitioner] put in, both to protect itself where it meted out discipline, and to harass some of the union supporters," and to which "[c]ertainly the Union did not agree" (Pet. App. A24).[6]

Concluding that petitioner's unilateral institution of the 60-day probationary period and the call-in was unlawful,[7] the Board explained (Pet. App. A62-A63; footnotes omitted):

[6] The Board agreed with the Law Judge that petitioner's unilateral action violated Section 8(a)(5) of the Act, but found, in addition, that since petitioner was motivated by an intent to retaliate against the employees' selection of the Union, the imposition of the warning system also violated Section 8(b)(3) of the Act (Pet. App. A-59-A61).

[7] The Board agreed with the Law Judge that the application of the new rule to Union Committeeman Marrero's layoff was a "subterfuge" which violated Section 8(a)(3) of the Act. The Law Judge did not make a finding that the institution of the two provisions violated Section 8(a)(5) of the Act. (Pet. App. A37, A62 n. 5.)

We agree with the Administrative Law Judge that prior to the institution of the 60-day probationary period provision on February 5, 1976, [petitioner] and the Union agreed to a layoff and seniority list, without mention or consideration of the 60-day probationary period. With respect to the call-in rule, the evidence shows that it was instituted in about December 1975, and was thereafter applied to employees by means of the written warning notice-discipline system. Prior to the application of the tentatively agreed to call-in rule, and since the institution of the written warning notice-discipline system after the election, [petitioner] had applied a 9 a.m. call-in rule. [Petitioner] neither informed employees of the call-in rule prior to its application by means of the disciplinary system, nor of the 60-day probationary period prior to its application to Marrero and the other six employees.

Although these provisions had been tentatively agreed to in negotiations between [petitioner] and the Union, negotiations had not been completed and the contract had not been submitted for ratification, a condition which Union Business Representative Haderly clearly made a condition precedent to final agreement on a contract. Further, there was never any agreement between the parties that particular contract provisions could be implemented nor was there any agreement between the parties that contract provisions would be implemented as soon as they were tentatively agreed upon.

3. In upholding the Board's conclusions, the court of appeals rejected, as unsupported by the evidence, petitioner's contentions that the system of written

warnings was not a substantial change in its existing practice (Pet. App. A73-A74), and that the call-in system was a relaxation of a stricter rule which had previously been in effect (Pet. App. A79-A80).

The court also rejected petitioner's contention that the Union had waived by inaction its objections to the warning system or that it had agreed to it, pointing out that the Union had not learned of the change until mid-September, had promptly raised the issue with petitioner, and had agreed to the warning system only on petitioner's representation that it would not be used for disciplinary purposes (Pet. App. A74-A75).

Finally, the court found no merit in petitioner's contention that, because the call-in rule and the 60-day probationary period had been agreed to by the Union in the bargaining negotiations, petitioner was entitled to institute those provisions at will. The court stated (Pet. App. A80-A81; footnote omitted):

> We express no opinion as to what the result might have been had the parties been silent as to the time and method of implementation for the tentative provisions, and the employees had been notified prior to the implementation of the changes, but that is not the situation here.
>
> * * * [W]e find that because there had been no agreement nor understanding that tentatively approved proposals were to go into immediate effect, there was the possibility that further revisions would or could be made before ratification and implementation of the provision, thus bargaining may not have been completed on the provisions. We find that there was sufficient

evidence for the Board to conclude that the implementation of the call-in rule was a violation of Section 8(a)(5).

The court added that, in any event, no agreement on the effective date of the institution of the probationary period had been reached, the Union did not agree to apply it to the lay-off in question, and the evidence supported the Board's finding that its application to Marrero was in retaliation for his union activism (Pet. App. A85).

ARGUMENT

1. Petitioner essentially urges that it did not violate the duty to bargain by piecemeal implementation of working conditions which had been tentatively agreed upon in bargaining negotiations.[8] There is no merit to this contention.

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[8] Petitioner's alternative contentions that the warning system did not constitute a change from existing procedure (Pet. 26-32), that the call-in system was actually a relaxation of the existing rule (Pet. 24-25), and that the 60-day rule was not discriminatorily applied to Marrero (Pet. 19-23) raise factual issues which do not warrant this Court's review. In any event, as shown above, the Board's findings on these points are amply supported by the record.

Petitioner's contention that the written warning policy was not instituted in retaliation for the employees' union activities in violation of Section 8(a)(3) of the Act (Pet. 29-32) also raises only a factual issue. Petitioner objects particularly to the Board's reliance on the Bonner-Colosi conversation (see *supra* at p. 4), insisting that it had been denied (Pet. 31). However, Bonner failed to testify at the hearing, and Colosi would say no more than that he did not "recall" the conversation (Tr. 1483-1484).

To the extent that petitioner argues (Pet. 25-26) that the Union did not object to, or acquiesced in, the piecemeal implementation procedure, petitioner merely quarrels with the Board's and the court's contrary finding, an issue which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

To the extent that petitioner urges that it had a right to take such action despite the Union's disapproval, the authorities it relies upon stand for no such result. It is settled that the duty to bargain includes the obligation to refrain from unilaterally changing established terms and conditions of employment without first consulting and bargaining with the employees' bargaining representative, and that such unilateral action constitutes a violation of Section 8(a)(5) and (1) of the Act regardless of the employer's motivation. *National Labor Relations Board* v. *Katz*,[9] 369 U.S. 736, 743, 747; *National Labor*

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[9] Petitioner's reliance on *Katz* is misplaced since the terms of the contract here were not final, but rather were subject to change until the entire contract was ratified; thus, as in *Katz*, petitioner's "unilateral change in conditions of employment under negotiation [was] * * * a violation of § 8(a)(5)" (369 U.S. at 743). Similarly, the *dictum* in *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224, lends no support to petitioner's position, since in that case impasse had been reached prior to the unilateral changes (337 U.S. at 218, 222). Therefore, the statement that an employer might properly impose a unilateral change where the change implemented a term already offered pertained only to post-impasse situations. Here, on the other hand, no impasse had been reached. See *Katz*, *supra*, 369 U.S. at 743 n. 11. And in *National Labor Relations Board* v. *Bradley Washfountain*

Relations Board v. *C & C Plywood Corp.*, 385 U.S. 421, 425-430. The application of that principle has particular force here, because the changes put into effect were less favorable to employees than those in existence, and the warning system and application of the 60-day probation period to Marrero were animated by anti-union considerations.

Co., 192 F.2d 144 (C.A. 7), the court of appeals simply held that where the union is consulted by the employer prior to pre-contract implementation of provisions and does not object, that implementation is not unlawful. 192 F.2d at 148, 151. Here, however, neither the employees nor the Union were consulted prior to unilateral implementation, and objections were made when the Union discovered what was happening (Pet. App. A80-A81).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN S. IRVING
General Counsel

WADE H. MCCREE, JR.
Solicitor General

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID S. FISHBACK
Attorney
National Labor Relations Board

SEPTEMBER 1978

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